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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 229. 262

FIRST NATIONAL BANK IN ST. LOUIS, PLAINTIFF IN
ERROR,

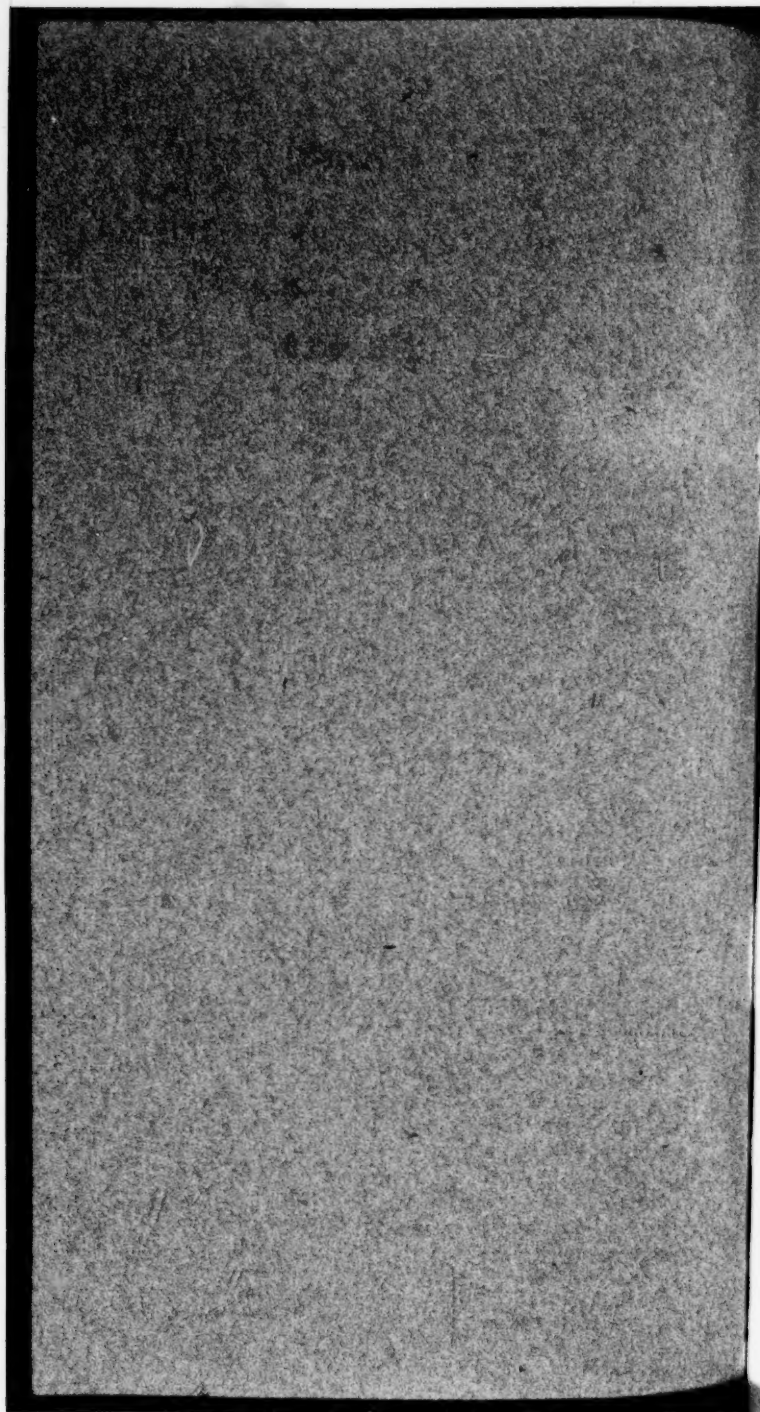
vs.

STATE OF MISSOURI AT THE INFORMATION OF JESSE
W. BARRETT, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED MARCH 22, 1904.

(20,400)



(29,489)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 919.

FIRST NATIONAL BANK IN ST. LOUIS, PLAINTIFF IN
ERROR,

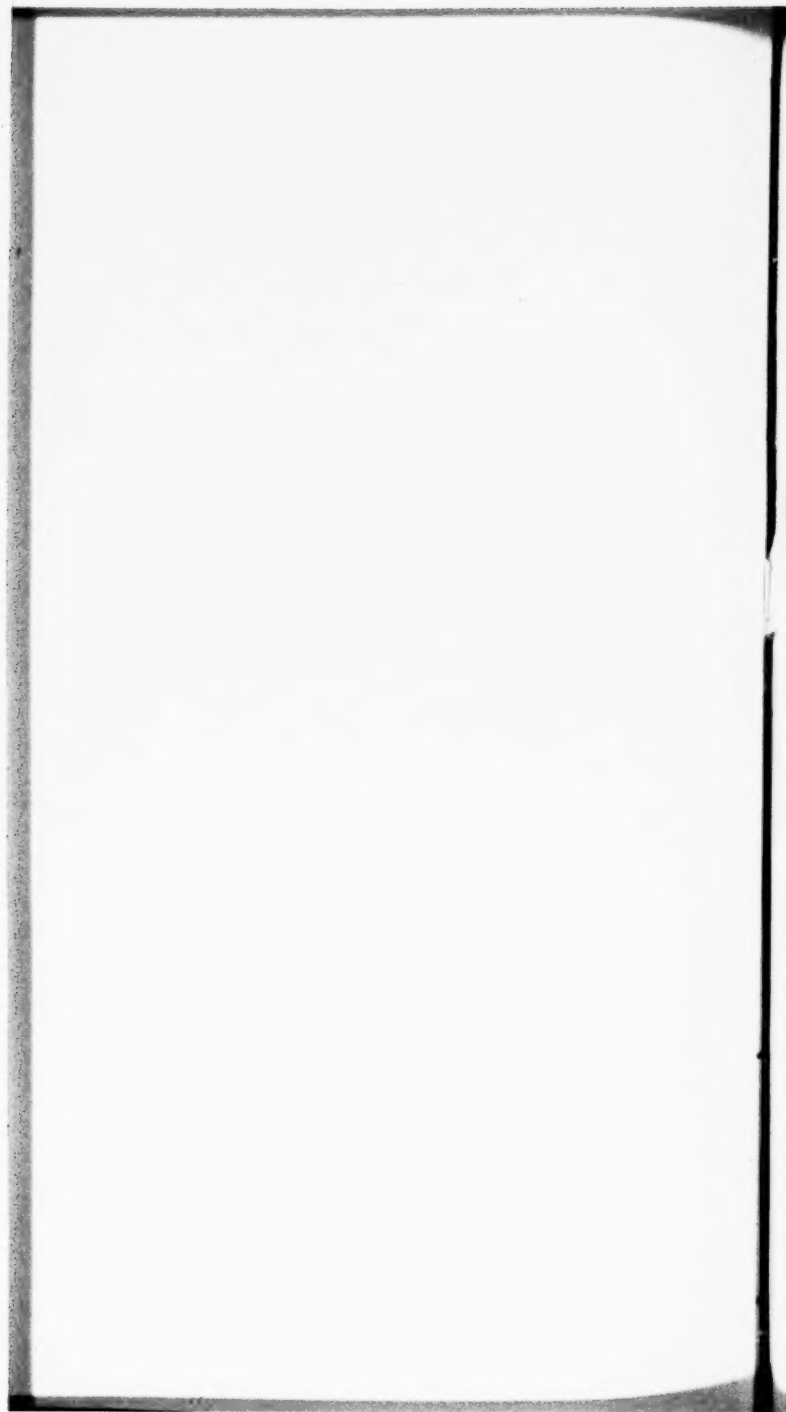
vs.

STATE OF MISSOURI AT THE INFORMATION OF JESSE
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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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Caption.

UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered That, heretofore, and on the 27th day of June, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause entitled "State of Missouri, by Jesse W. Barrett, Attorney General, ex inf., vs. First National Bank in St. Louis, a Corporation," No. 23,753, an information in the nature of quo warranto, which said information in the nature of quo Warranto is in the words and figures following, to-wit:

IN THE

Supreme Court of Missouri, en Banc, April Term, 1922.

STATE OF MISSOURI, by JESSE W. BARRETT, Attorney General, ex Inf.,

vs.

FIRST NATIONAL BANK IN ST. LOUIS, a Corporation, Respondent.

Information.

[Filed June 27, 1922.]

"Comes now Jesse W. Barrett, Attorney-General of the State of Missouri, ex officio, and informs the Court that the First National Bank in St. Louis is a banking association incorporated under
2 the laws of the United States and engaged in conducting a general banking business at the City of St. Louis, Missouri, and that pursuant to its charter and the law under which it stands incorporated it is required to transact its business at an office or banking house located in the place specified in its organization certificate, which place so specified is the City of St. Louis, Missouri, and that pursuant to said authority it selected and established and for several years past has conducted and is now conducting its business at a banking house located at the southwest corner of Broadway and Locust street in said City of St. Louis.

"Your informant further states that notwithstanding the foregoing, the said First National Bank in St. Louis did, on or about the 15th day of June, 1922, illegally open a branch bank for conducting a general banking business at No. 818 Olive street, St. Louis, Missouri, in a separate building located several blocks from the banking house before mentioned, which said branch bank it is now conducting and proposes to continue to conduct and where it is engaged in the business of banking, discounting bills, notes and other evidences of debt, receiving deposits and paying out the same upon check, buying and selling bills of exchange and lending money.

"Your informant further states that the said act and conduct of the First National Bank in opening and conducting the branch bank aforesaid is in controvention of any authority conferred upon it by its charter or by the act of Congress under which it stands incorporated, and without authority conferred upon it either by the act of Congress or by the laws of the State of Missouri, and that it is conducting said branch bank in violation of the laws of the United States and of the State of Missouri, and that in maintaining said branch bank and conducting the business of a bank thereat, it has usurped and is usurping authority, powers and privileges which have been denied to it and withheld from it both by state and federal laws.

"Your informant further states that the said First National Bank is arranging to and proposes shortly to open other branch banks, some twelve or fifteen in number, at various points or locations in the City of St. Louis, and that it will do so unless prevented by order of this Court.

"Your informant further states that the Legislature of the State of Missouri, pursuant to the general policy of the people of the State of Missouri relative to the establishment of branch banks, and in conformity with the well fixed and settled rule of Congress to withhold the power of establishing branch banks from national banks, has by direct legislation prohibited the establishment of branch banks by state institutions, and that if respondent is permitted to continue in the operation of the branch bank already established and to establish other branch banks, other national banks in the State of Missouri will establish branches in the respective cities and counties of their domicile, all of which will work irreparable damage and injury to the banking business in the State of Missouri.

"Your informant further states no law of any character, state or federal, has been enacted governing or regulating the establishment and operation of branch banks in Missouri, and that if respondent herein is permitted to establish, maintain and operate branch banks, other national banks will exercise the same privilege without the necessary and wholesome safeguards, limitations and regulations for the protection of the banking business and the public in general; that there is now pending in the Congress of the United States, and before the Committee on Banking and Currency, House Bill No. 6257, under which it is proposed to legalize the establishment of branch banks in those states which permit state banks to own and operate branch banks, and prohibit national banks from owning and establishing branch banks in those states which prohibit state banks from owning and operating branch banks; that said bill is regulatory in character, fixing and determining the minimum amount of capital for each branch bank and limiting the number of branch banks which may be owned and operated by any one banking institution; that respondent stands fully advised of the pendency of the aforesaid bill, as well as of the fixed policy of Congress relative to the establishment of branch banks as aforesaid, and that to permit respondent to continue in the usurpation of the powers and privileges hereinbefore complained of, particularly in the absence

of any wholesome and necessary regulation as provided in said proposed bill, will work great harm and injury not only to the banking interests of the State of Missouri, but as well to its industrial and general business activities and welfare.

"Your informant further states that if respondent is permitted to continue in the operation of the branch bank business, and other national banking associations follow in the usurpation of such privileges, the state banking institutions throughout the State of Missouri will suffer irreparable injury and be at all times threatened with the impending danger and evil of having national banking associations domiciled in their respective counties establish branches in each and every town, city, village or hamlet within the boundaries of said counties, and that such usurpation of rights and privileges is not only contrary to the policy of the people of the State of Missouri relative to the general banking business, but would result in material loss and damage to the banking and business interests of the state.

"Wherefore, your informant prays the Court to make an order on the respondent requiring it to show by what warrant, right or authority it has established and is conducting the branch bank aforesaid, and by what warrant, right or authority it proposes to establish and conduct other branch banks; that pending the final determination of this cause the Court restrain and enjoin the respondent, its officers, agents and servants, from establishing and operating branch banks other than the one already established as aforesaid, and from carrying on a banking business at any place excepting at its regular banking house and excepting the branch bank already established, and that upon the final hearing of this cause respondent be ousted from the privilege of operating its said branch bank or any other branch banks, and from conducting a banking business at any place or location other than one banking house or office maintained by it for such purposes, and that such other and further orders and relief be granted as to the Court shall seem meet, just and proper." Jesse W. Barrett, Attorney-General. Merrill E. Otis, Assistant Attorney General. Sam B. Jeffries, Carter, Collins and Jones, Foristel and Eagleton, Marion C. Early, of Counsel.

6 And thereafter, on the 28th day of June, 1922, the following order was made and entered of record in said cause, to-wit:

[Title omitted.]

Now at this day, the Court having considered and fully understood the information in the nature of a quo warranto, heretofore filed herein by the said informant, doth order that an order to show cause issue herein directed to the said respondent, the said order to show cause to be returnable on the 28th day of July, 1922, in Court in Banc.

Which order to show cause, issued on the 28th day of June, 1922, is in the words and figures following, to-wit:

In the Supreme Court of Missouri, En Banc, April Term, 1922.

[Title omitted.]

Order to Show Cause.

[Filed June 28, 1922.]

"Whereas, Jesse W. Barrett, Attorney-General of the State of Missouri, has filed in the above-entitled cause an information in the nature of a quo warranto, a copy of which is hereto attached, charging that the above-named respondent, illegally and without authority of law, did, on or about the 15th day of June, 1922, open a branch bank for conducting a general banking business at No. 818 Olive street, St. Louis, Missouri, in a building separate, and at a distance, from its office and banking house located in the place specified in its organization certificate, and that it is and has been conducting said branch bank in violation of the laws of the United States and of the State of Missouri, and that in maintaining said branch bank and conducting the business of a bank thereat it has usurped and is usurping authority, powers and privileges denied to and withheld from it by both state and federal laws; and that the said respondent is arranging to and proposes to open other branch banks in the City of St. Louis.

7 "Now, therefore, the said respondent, First National Bank in St. Louis, a corporation, is hereby commanded to be and appear before the Supreme Court of Missouri in Banc on the 28th day of July 1922, and show by what warrant, right or authority it has established and is conducting the branch bank aforesaid, and by what warrant, right or authority it proposes to establish and conduct other branch banks, and then and there show cause why it should not be ousted from the privilege of operating its said branch bank, or any other branch bank, and from conducting a banking business thereat, as in said information prayed.

Witness my hand as Clerk of said Supreme Court and the seal of said Court hereto affixed. Done at my office in the City of Jefferson, this 28th day of June, 1922. J. D. Allen, Clerk, by A. L. Pryor, D. C. (Seal.)

And thereafter, and on the same day, to wit, the 28th day of June, 1922, the following temporary restraining order was made and entered of record in said cause, to wit:

[Title omitted.]

Temporary Restraining Order.

[Filed June 28, 1922.]

Now at this day, the Court having considered and fully understood the application heretofore filed by the said informant for a

restraining order against the said respondent, to restrain it, pending the final determination of this cause, from establishing and operating branch banks, it is ordered by the Court that, pending the final determination of this cause, the said respondent, First National Bank in St. Louis, a corporation, its officers, agents and servants, be restrained from establishing and operating branch banks, other than the branch bank already established by it, and from carrying on a banking business at any place excepting at its regular banking house and excepting at the branch bank already established by it, as aforesaid.

8 And thereafter, on the 23rd day of August, 1922, the said respondent filed its motion to dissolve the said temporary injunction, made and issued on the 28th day of June, 1922, which said motion to dissolve is in the words and figures following, to wit:

In the Supreme Court of Missouri, En Banc, April Term, 1922.

[Title omitted.]

Motion to Dissolve Temporary Injunction.

[Filed Aug. 23, 1922.]

Now comes the respondent, First National Bank in St. Louis, and, appearing specially for this purpose only, and not waiving its plea to the jurisdiction herein, moves the Court to dissolve the temporary injunction issued herein and, for grounds of said motion, states:

(1) That there is no authority in law for the issuance of said injunction by this Court;

(2) That United States Revised Statutes, Section 5242, also known as United States Compiled Statutes, Annotated, 1916, Section 9834, concerning national banks, provides that 'no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court;' and that the granting of such temporary injunction is in direct violation of such statute and the laws of the United States;

(3) That, as shown by the information filed herein and the record in this cause, the respondent is a national bank and within the protection of said statute, and that by procuring of said restraining order or temporary injunction in this cause, the petitioner herein is wrongfully and unlawfully attempting to interfere with the business, property and management of the respondent, and causing it great financial loss in its investments in branch agencies in the City of St. Louis.

Wherefore, the respondent prays that the temporary injunction or restraining order issued herein be set aside, vacated and dissolved by the Court. Jones, Hoeker, Sullivan & Angert, Attorneys for Respondent.

6- **Motion to Quash and Dissolve Alternative Writ.**

Received copy of this motion this 23rd day of August, 1922.
M. E. Otis, Asst. Atty. Gen.

9 And thereafter, on the 8th day of September, 1922, the said respondent filed in said cause its motion to quash and dismiss the "alternative writ" (order to show cause) herein, which said motion is in the words and figures following, to wit:

In the Supreme Court of Missouri, In Banc.

[Title omitted.]

Motion to Quash and Dismiss Alternative Writ.

[File Sept. 8, 1922.]

And now comes the respondent, and moves the Court to quash and dismiss the alternative writ herein, for the reasons following:

1. The State of Missouri possesses no power of visitation over the respondent, and is without authority to complain of any violation or alleged violation of the charter powers of respondent.

2. The Attorney-General of Missouri possesses no power of visitation over respondent, and is without authority to complain of any violation or alleged violation of the charter powers of respondent. Jones, Hocker, Sullivan & Angert, Attorneys for Respondent.

10 And thereafter, on the 24th day of October, 1922, the respondent filed in said cause its demurrer to the information herein, which said demurrer is in the words and figures following, to-wit:

In the Supreme Court of Missouri, en Banc, October Term, 1922.

[Title omitted.]

Demurrer.

[Filed Oct. 24, 1922.]

Now comes the respondent and demurs to the information filed herein, and for grounds of said demurrer states:

1. That said information does not state facts sufficient to entitle the informant or the State of Missouri to any relief.

2. That the information shows upon its face that this Court has no jurisdiction over the subject matter of this proceeding.

3. That the information shows upon its face that respondent is a national bank, organized under the laws of the United States, and subject only to the control and regulation of the Government of the United States, and that the informant has no authority to institute this proceeding, the Government of the United States or its proper

officers, only, being authorized to question the prerogative rights of the respondent.

Wherefore, respondent says that it ought not to be required to answer said information, and prays judgment sustaining this demurrer. Jones, Hocker, Sullivan & Angert, Attorneys for Respondent.

11 And thereafter, and on the 1st day of November, 1922 the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, en Banc, October Term, 1922.

[Title omitted.]

Argument and Submission.

[Nov. 1, 1922.]

Come now the said parties, by attorneys, and after argument herein, submit this cause to the court.

And thereafter, and on the 3rd day of March, 1923, the following further proceedings were had and entered of record in said cause, to-wit:

12 In the Supreme Court of Missouri, en Banc, October Term, 1922.

[Title omitted.]

Judgment.

[Filed Nov. 3, 1923.]

Now at this day, comes the State of Missouri, by Jesse W. Barrett, the Attorney-General, and comes also the said respondent, by attorney, and the Court here having considered the information in the nature of quo warranto filed herein, and the said respondent's demurrer thereto, and being now fully advised, doth find that the said respondent, illegally and without authority of law, did, on or about the 15th day of June, 1922, open a branch bank, for conducting a general banking business, at No. 818 Olive street, in the City of St. Louis, Missouri, in a building separate, and at a distance, from its office and banking house located in the place in said city specified in its organization certificate, and that it is and has been conducting said branch bank in violation of the laws of the United States and of the State of Missouri, and that in maintaining said branch bank and conducting the business of a bank thereat it has usurped and is usurping authority, powers and privileges denied it by the laws of the United States and of this State. It is therefore considered, ordered and adjudged by the Court that the said respondent, First Na-

tional Bank in St. Louis, be ousted from the privilege of operating its said branch bank, located at No. 818 Olive street, in the City of St. Louis, Missouri, or any other branch bank, and from conducting a banking business thereat, as prayed in the said information in the nature of quo warranto; and that the State of Missouri recover against the said respondent its costs and charges herein expended and have execution therefor. (Opinion filed.)

Which said opinion is in the words and figures following to-wit:

13 In the Supreme Court of Missouri, en Banc, October Term, 1922.

[Title omitted.]

Opinion, Walker, J.

This is an original proceeding in quo warranto to determine the authority of a national bank engaged in business in the city of St. Louis to establish and conduct a branch bank at another than its regular place of business in said city.

I. A national bank is an artificial legal entity, created to facilitate the transaction of fiscal affairs under the authority of the laws of the United States. Like other corporations, it possesses such powers as are granted to it by the act of its creation, or more comprehensively stated, which have been or may be conferred upon it by Congress within the limitations of the Federal Constitution. This reference as to the origin of its powers does not, as we shall subsequently show, prevent state legislation in regard thereto. Existing, as it necessarily does, by law, it possesses only such powers as are expressly granted or which may necessarily be implied for the effective discharge of its corporate functions. As to powers expressly granted, no difficulty need be encountered in defining their limitations. As to those incidental, it must appear, to authorize their exercise, that they are clearly within the scope and purview of the purpose for which the corporation was created. This rule is especially applicable when it is sought to invoke what are termed the powers of a corporation incident to it at common law; such application being authorized only when it is apparent that the power invoked is a necessary incident to the proper exercise of the corporation's existence or functions.

(*Kerens v. Trust Co.*, 283 Mo. 1, c. 621; *State ex inf. Missouri Ath. & St. L. Clubs*, 251 Mo. 1, c. 599; *Millinery Co. v. Trust Co.*, 251 Mo. 1, c. 575.)

These rules are elementary in character to the extent that they may be termed horn-book law on this subject. They have been stated to emphasize their general application to all classes of corporations in the absence of statutes to the contrary.

While we have contented ourselves with the citation of cases in this behalf determined within our own jurisdiction, they assert a general doctrine which does not contravene the rulings of any court, state or national, when rightly considered. To illustrate: In *Bulard v. Bank* (18 Wall. 1, c. 593) it was held that "the extent of the

powers of national banking associations is to be measured by the act of Congress under which such associations are organized."

In *Logan etc. Bank v. Townsend* (139 U. S. l. c. 73) it was announced with equal emphasis that "It is undoubtedly true, as contended by the defendant, that the National Bank Act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

To a like effect are the following cases: *Bowen v. Needles Nat. Bk.* (94 Fed. 925); *Commercial Nat. Bk. v. Firl* (82 Fed. 799, 49 U. S. Ap. 596); *Hanover Nat. Bk. v. Burlingame Nat. Bk.* (109 Fed. 421, 48 C. C. A. 482); *Hyde v. Equit. Life Assur. Soc.* (116 N. Y. Sup. 219); *Ocmulgee Riv. Lum. Co. v. Ocmulgee Val. Ry. Co.* (251 Fed. 161); *State v. Am. Sugar Ref. Co.* (138 La. 1005); *Somerville Water Co. v. Somerville* (78 N. J. Eq. 199); *Knapp v. Sup. Commandery* (121 Tenn. 212).

Guided by these rules a reference to and a review of the laws creating national banks and defining their powers is of first consideration.

15 Persons desiring to form a national bank are required, among other things, under the act of Congress of June 3, 1864, to file with the Comptroller of the Currency a statement of the place where its operations of discount and deposit are to be carried on, designating the state, territory or district and the particular county, city, town or village. (Subdiv. 2, § 5134, p. 3455, 3 Comp. Stat. U. S.)

A subsequent section of the same act provides that the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate. (§ 5190, p. 3486, 3 Comp Stat. U. S.)

No express power to establish a branch bank appears in either of these statutes. Section 5134, in requiring the certificate of organization to designate the county, city or town in which the bank is to be located, is intended for the information of the comptroller in enabling him to intelligently determine whether the authority sought to be exercised should be granted. While the banking act is silent on the subject, a construction of same is not unreasonable which clothes the comptroller with at least such discretion in the premises as will enable him to act intelligently or with a proper regard for the demands of business in approving or rejecting the articles of organization. Hence, a general designation of the proposed business location as provided in said section is all that is necessary.

The purpose of § 5190 is not for the information of the Comptroller, it being a matter with which he has no concern when he has granted the articles as to where the place of the business shall be located within the county, city or town. This is a matter to be determined by the board of directors in establishing the business. To render their act specific it must be confined to the terms of the statute, viz.: to "an office or banking house within the county, city or town" named in the articles. This location having been established,

16 it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words "an office or banking house" cease to be specific, and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. Such a construction finds no resting place in reason. If followed it would, instead of centralizing and rendering more stable the powers of a bank, enable it, by multiplying its places of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. Such a effect was certainly never contemplated by the banking act.

17 II. We are more concerned however with an interpretation of the language of subdivision 7 of § 5136, granting incidental powers, whether literally or liberally construed than with the probable effect of its operation under the construction sought to be given to it by the respondent. If, as we have stated, the terms of § 5190 be unmistakable in limiting the location of the place of business, such location, so long as maintained, will under the terms of the statute, exclude by implication the establishment of a branch bank, the business of which is to be conducted under the authority of the original articles of organization. However, it is contended that the power to establish branches is authorized under § 5136. The language of subdivision 7 of that section provides, among other things, that the board of directors of a bank may, subject to law, exercise all such incidental powers as shall be necessary to carry on the banking business. Several preliminary assumptions are necessary before substantial color can be given to this contention. First, section 5190 must be so construed as to authorize the transaction of a bank's business at offices or banking houses instead of at "an office or banking house"; second, the establishment of a branch bank must be held to be the exercise of an incidental power; third, such power when exercised must be within the law; and, fourth, it must be necessary to the transaction of the banking business.

The first assumption we have discussed with the result that the unmistakable character of the words employed and the purpose to be accomplished did not in our opinion authorize such an interpretation of the section as to enable its terms to be read in the plural as well as the singular number. The second involves the question as to the meaning of incidental powers. The statute (subdiv. 7, § 5136) employs the word incidental, rather than the word implied in designating the power other than that expressly conferred on the board of directors. An incidental power, as we said in *State ex inf. Harvey v. Missouri Ath. & St. L. Clubs* (261 Mo. l. c. 599) is one directly and immediately appropriate to the execution of the powers expressly granted and exists only to enable the corporation to carry out the purpose of its creation. (Citing cases.)

An implied power is one that may be inferred from that granted, or as the Supreme Court of Massachusetts has said (*Grant v. Marshall*, 138 Mass. 228) it is a grant or reservation by implication

of law. In *State ex inf. Harvey* (supra) we defined an implied power more elaborately as one "possessed by a corporation not indispensably necessary to carry into effect others expressly granted and comprises all that is appropriate, convenient and suitable for that purpose, including as an incidental right a reasonable choice as to means to be employed in putting into practical effect a power of this character." Without chopping logic or refining distinctions as to these adjectival words, it will suffice to say that in statutes and judicial opinions they are frequently interchangeably used. (3 *Thomp. Corp.* 2nd ed., § 2105.) This need not concern us, however, in the determination of respondent's contention, as the statute uses the word incidental and to this we will give attention.

18 What, therefore, are the powers of a national bank "directly or immediately appropriate to the execution of the specific powers granted?" The provisions of Subdiv. 7, following the phrase conferring incidental powers upon the board of directors, furnish examples from which, by analogy, the scope of this character of powers may be determined. They include the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidences of debt; the receiving of deposits; the buying and selling of exchange, coin and bullion; the loaning of money on personal security; and the obtaining, issuing and circulating of notes. While these powers are distinct and neither is a limitation upon either of the others, they cannot be otherwise held than as directly and immediately appropriate to the transaction of the banking business. Although they may not be such incidental powers as are given generally to all banking institutions, they are incidental to banks created under the National Bank Act. (*Seligman v. Charlottesville Nat. Bk.*, 3 *Hughes* 647, 21 *Fed. Cas. No.* 12642.) While a national bank may lawfully do many things in securing and collecting its loans in the enforcement of its rights and the conservation of property previously acquired, the exercise of such powers is incidental in being necessary for the purpose of carrying into effect the powers expressly granted. (*Morris v. Springfield Third Nat. Bk.*, 142 *Fed.* 25, 73 *C. C. A.* 211; *Cooper v. Hill*, 94 *Fed.* 582, 36 *C. C. A.* 402.) The cases cited are illustrative of the limitations upon the latitude given national banks, not in the character of acts they may primarily engage in as a business, but in the management and protection of property and property rights acquired in the usual banking transactions, including such minor incidental powers in addition as may be adapted to the ends in view.

In addition to those cited the trend of the cases defining the incidental powers of national banks is in harmony with the foregoing conclusion.

The apparent purpose for the establishment of branch
19 banks is to multiply the places of business of the principal bank and thereby increase the volume of same. As a manifestation of commercial progress, the effort may well be commended. That phase of the matter, however, is not under con-

sideration. It is a question of power and not progress that demands solution. Certainly it is in no sense essential to the exercise of any of the powers granted nor is it a necessary incident to the carrying on of the banking business within the meaning of the statute.

The third limitation necessary to be observed before an incidental power can be invoked by a national bank, is that it must be "within the law." The law referred to is the National Bank Act to which banks organized thereunder owe their existence and within the scope and purview of which they must exercise their functions. The sections of the act reviewed lend no countenance to the contention that the establishment of branch banks is within the scope and purview of these sections and hence not within the law.

The fourth and last limitation upon the exercise of incidental power by a board of directors required by subdivision 7 is that such power shall be necessary "to carry on the business of banking." In a review of the other conditions necessary to the exercise of power referred to, we have held that the carrying on of the banking business did not require the establishment of branch banks and hence that it was not within the terms of the statute.

III. An unambiguous statute, such as the National Bank Act, does not require the adventitious aid of subsequent kindred legislation to determine its meaning. Despite this fact where, as here, there is a general grant of power, however clear that grant may be, the enactment of subsequent legislation containing a specific kindred grant of power will afford at least persuasive support to the conclusion that the latter was not included within the former or the original grant. Such is the effect of the Act of Congress of March 3, 1865, now § 5155, 3 U. S. Comp. Stats. p. 3467. This act provides that any bank or banking institution organized under a state law and having branches, may in conformity with existing law become a national bank and retain its branches. In the passage of this act it is evident that the legislative construction of the original is that it did not authorize the establishment of branch banks. Otherwise the subsequent section 5155 would not have been enacted. A recognition of the limitations of the National Bank Act is evident from the fact that the right of a national bank to have branches as provided in said section is limited to states the banking laws of which authorize the establishment of branches.

The establishment by special acts of Congress of a branch bank at Chicago during the Columbia Exposition and at St. Louis during the Louisiana Purchase Exposition, affords further evidence of legislative construction of the National Bank Act, which excludes from its incidental powers the right to establish branch banks.

In addition, it is a well established rule of construction that a long continued interpretation of a statute by public officers charged with its execution, while not controlling upon the courts, is entitled to special consideration. (*McAllister v. Cupples Station*, 283 Mo. 115; *State ex rel. Chick v. Davis*, 273 Mo. 660; *State ex rel. Kin. Tel.*

Co. v. Roach, 269 Mo. 437; Ewing v. Vernon Co., 216 Mo. l. c. 689.)

Apropos of the foregoing, it is shown that the attorneys general of the United States have uniformly construed the National Bank Act as not authorizing the establishment of branch banks.

IV. Enough has been said to demonstrate the fact that neither by express terms or reasonable implication can it be held that national banks are authorized to establish branches in states which have not granted that authority to banking corporations doing business therein. This being true, it remains to be determined whether the processes of the state can be invoked to prevent the exercise of power by a national bank shown to be *ultra vires* under the law of its creation. That national banks are corporate entities

21 which owe their existence to Federal law alone and as such are subject to the paramount authority of the United States, there can be no question. Equally as well established is the fact that a state cannot through its legislative department define the duties of national banks or control their affairs whenever such attempted exercise of authority expressly conflicts with the law of the United States. (*Davis v. Elmira Savings Bk.*, 161 U. S. 272; *McClellan v. Chipman*, 164 U. S. 356.)

The information filed herein by the Attorney-General does not involve the commission of an act in conflict with the laws of the United States nor does it tend to impair the efficiency of any agency of the National government. It cannot, therefore, be said to be in conflict with the rule above announced and hence does not violate it.

This conclusion finds ample support in a review of the National Bank Act alone; but if further reasons therefor are deemed necessary they may be found in an illuminating discussion by the Supreme Court of Kentucky (*First Nat. Bk. v. Comm.*, 143 Ky. 816, 34 L. R. A. (N. S.) 54) defining the limits that may be placed upon the Federal control of national banks, or conversely the extent to which the state may exercise control over them. The state court ruled in the affirmative on this question. The objection was made that the bank was an agency of the Federal government for which Congress had provided a complete system of control and regulation, and that the state could not in any manner interfere with its affairs and that state laws applicable to banks incorporated within the state were inoperative as to national banks. The court held, in effect, that while a state cannot either by its constitution or legislation directly or indirectly regulate or control the organization or conduct of a national bank so as to interfere with the business for which it was created, the laws of the state applicable to banks and other corporations organized therein may be invoked against a national

22 bank when it attempts to exercise rights or do things outside the scope of the business it was created to conduct and which is not essential to its existence or efficiency; that when a national bank exceeds the purpose of its creation and goes beyond the scope of its functions the state may deal with such of its transactions as are in excess of the authority conferred upon it by Congress and in

violation of the laws of the state in the same manner as it would deal with the business or property of any other banking corporation.

The rule as thus announced is supported by the holding of the United States Supreme Court in the Davis case, *supra*, in which, after declaring the paramount authority of the Federal law over national banks, it was said: that "nothing in this opinion is intended to deny the operation of general and indiscriminating state laws on the control of national banks so long as such laws do not conflict with the letter or the objects and purposes of Congressional legislation."

A further ruling to like effect by the United States Supreme Court is found in the McClellan case, *supra*. In that case an insolvent debtor conveyed real estate to a national bank thereby giving it a preference. This act was assailed by the other creditors as in violation of a state statute. The bank resisted the right of the creditors as thus asserted, upon the ground that national banks, under the Federal laws, were authorized to take deeds to real estate to secure preexisting debts, and that the Massachusetts statute was in conflict with the act of Congress and, hence, inoperative. The Supreme Court held that the state law was not in conflict with the act of Congress and that the other creditors had a right to share in the property conveyed to the bank. The exhaustive manner in which the question was considered is shown in the following excerpt from the opinion: "National banks are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts

are governed and construed by state laws. Their acquisition
23 and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

* * * Nor is there anything in the statutes of the State of Massachusetts here considered which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which, in case of insolvency, seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank within a state, in violation of the state laws on the subject of minority or coverture, was valid because state laws were in conflict with the act of Congress, or impaired the power of the bank to perform its functions."

V. In this state the banking business can be conducted only by a corporation. Thus organized, the extent of its powers must, as we have said, be determined by the statute of its creation. The state

banking act gives express recognition to this rule in providing that banks, whether incorporated under Federal or state law, can transact only such business as is permitted by the laws of the United States or of the state (§ 11684, R. S. 1919). Branch banks, not having been permitted by the state law either by express terms or necessary implication, the well recognized canon of construction will authorize the exclusion of this power from those granted. Reliance upon

24 this rule is, however, unnecessary in the presence of a subsequent section (§ 11737, R. S. 1919) in which it is provided "that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house." The attempt, therefore, of the respondent to establish a branch bank is not only an act in excess of its corporate powers but in violation of an express statute.

The writ of quo warranto invoked by the relator is a recognized right and an appropriate remedy under the circumstances. (State ex. inf. Attorney-General v. Standard Oil Co., 218 Mo. 1.) Upon an appeal to the Supreme Court of the United States in the Standard Oil case that court held (224 U. S. 276) that the proceeding by quo warranto which had been instituted in the state supreme court in that case by the attorney-general was authorized. Discussing the powers of the Missouri Supreme Court in the premises it was held that "Its decision and judgment necessarily imply that under that clause of the constitution it had jurisdiction of the subject-matter and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That ruling is conclusive upon us, regardless of whether the judgment is civil or criminal, or both combined."

VI. The right of the attorney-general to institute this action having been established, the question arises, although it does not seem to be seriously contested, as to the tribunal in which it should be brought.

The 16th subdivision of § 24 of the National Judicial Code provides, among other things, that the United States District courts have original jurisdiction "of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the comptroller of the currency, or any receiver acting under his

25 direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located."

The United States statutes further provide that national banks shall have power "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." (U. S. R. S., § 5136; U. S. Comp. Stats., 1916, § 9661.)

Under § 5198 (3 Comp. Stat. p. 3493; 6 Fed. Stat. Ann., p. 928)

prescribing where suits may be brought against national banks, it is provided "that suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

Under the proviso of an act of Congress approved July 12, 1882 (U. S. Comp. Stat. 1916, § 9668), it is further provided "that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suit may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

From the foregoing it will be seen that, as this case does not fall within the inhibitions of the Federal statutes quoted, jurisdiction of same may be entertained by this court.

In *Hermann v. Edwards* (238 U. S. 137) the United States supreme Court construed subdivision 16 of §24 of the National Code and held, as it must have held within the unmistakable meaning of said subdivision, that state courts were clothed with jurisdiction to hear and determine all cases against national banks except those exempted under said subdivision. The case at bar does not fall within those exemptions.

This is not a proceeding to deprive the respondent of any right or limit the exercise of any power conferred upon it by the laws of the United States; but to prevent it from committing an act in violation, under the established rules of construction, of the laws of its creation and expressly contravening a state statute.

The character of a judgment in quo warranto cases is largely within the discretion of the court and foreign corporations may, under numerous precedents, be prohibited by a general ouster from committing particular illegal acts. (*State ex. inf. Attorney-General v. Standard Oil Co.*, 218 Mo. 1; *State ex inf. Attorney-General v. Standard Oil Co.*, 194 Mo. 1. c. 149; *State ex inf. Attorney-General v. Armour Packing Co.*, 173 Mo. 1. c. 366; *State ex inf. Attorney-General v. Firemen's F. F. Ins. Co.*, 152 Mo. 1; *State ex inf. Attorney-General v. Arkansas Lumber Co.*, 190 S. W. (Mo.) 894.)

In view of all of the foregoing, judgment of ouster as prayed in the pleadings is hereby ordered. All concur, except Ragland, J., not sitting. R. F. Walker, J.

27

In the Supreme Court of Missouri.

[Title omitted.]

Petition for and Order Allowing Writ of Error.

[Filed Mar. 6, 1923.]

Considering itself aggrieved by the final decision of the Supreme Court of the State of Missouri in rendering judgment against it in the case of State of Missouri, ex rel. Jesse W. Barrett, Attorney General of the State of Missouri, vs. First National Bank in St. Louis, No. 23,753, the plaintiff in error, First National Bank in St. Louis, prays a writ of error from the decision and judgment of the Supreme Court of Missouri in said cause to the Supreme Court of the United States and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith. James C. Jones, Frank H. Sullivan, Ralph T. Finley, Counsel for First National Bank in St. Louis, Plaintiff in Error.

28

STATE OF MISSOURI, ss:

Supreme Court.

Let the writ of error issue upon the execution of a bond by the First National Bank in St. Louis to the State of Missouri in the sum of \$5,000.00; such bond, when approved, to act as a supersedeas.

Dated March 6, 1923. A. M. Woodson, Chief Justice Supreme Court of Missouri.

28½

[File endorsement omitted.]

29

In the Supreme Court of Missouri.

[Title omitted.]

Assignment of Errors.

[Filed Mar. 6, 1923.]

Plaintiff in error, First National Bank in St. Louis, complains of the State of Missouri, at the information of Jesse W. Barrett, Attorney General of the State of Missouri, and says there is manifest error in the record in the above cause and in the decision and judgment of the Supreme Court of Missouri, and for grounds of having the same reviewed in the Supreme Court of the United States, makes the following assignment of errors:

(1) The Supreme Court of Missouri was without jurisdiction to hear and determine this proceeding, or to award the relief sought by the State.

30 (2) The provisions of the Acts of Congress conferring jurisdiction on the Courts of the States, over actions against National Banking Associations (Section 57, Chapter 106, 13 Statutes at Large 116; and Section 24, Chapter 231, 36 Statutes at Large 1092) have no application to extraordinary, prerogative writs, such as here involved, and the Supreme Court of Missouri was without jurisdiction to entertain this proceeding.

(3) The Supreme Court of Missouri erred in holding and determining that the State of Missouri possessed visatorial powers over the plaintiff in error, with respect to the manner of its exercise of its franchise as a banking association under the laws of the United States.

(4) The Supreme Court of Missouri erred in holding and determining that the State of Missouri possessed the power to restrain the plaintiff in error by the writ of quo warranto, or a writ of that nature, in the exercise of a power claimed by the plaintiff in error to be granted it by the laws of the United States.

(5) The plaintiff in error being a banking association, organized and existing under the laws of the United States, and claiming and asserting under the Acts of Congress relating to banking associations so organized the right to establish branch banking offices within the limits of the City of St. Louis (its place of business designated in its charter), only the Government of the United
31 States possesses the power to restrain the plaintiff in error in respect thereto, and the Supreme Court of Missouri erred in determining otherwise.

(6) The franchise or right asserted by the plaintiff in error (of having branch offices or banks in the City designated in its Articles of Association as its place of business) being one granted or grantable only by the Government of the United States, therefore, only the Government of the United States has the right or power to restrain the plaintiff in error in the use of such asserted franchise or right, and the Supreme Court of Missouri is in error in holding and determining that the State of Missouri has the right so to do, in the manner in which it is attempted in this case.

(7) The plaintiff in error having been created a banking association under the laws of the United States, the State of Missouri may not control the plaintiff in error in the exercise of its corporate franchises, except to the extent authorized by Act of Congress, and such control, in the manner in which it is attempted in this case, has not been so authorized.

(8) Neither the State of Missouri nor the Attorney General of the State of Missouri had the power or authority to question or attack the right of plaintiff in error under its charter and the laws
32 of the United States to establish and operate branch offices or banks in the City of St. Louis, State of Missouri.

(9) Under its charter and the Acts of Congress relating to National Banking Associations, the plaintiff in error was and is possessed of power to establish and maintain branch offices or banks within the limits of the City of St. Louis, in the State of Missouri,

and the Supreme Court of Missouri erred in holding and determining to the contrary.

For which errors plaintiff in error, First National Bank in St. Louis, prays that the said judgment of the Supreme Court of Missouri may be in all things reversed, set aside and for naught held, and for such other and further relief as to the Court shall seem meet and just. James C. Jones, Frank H. Sullivan, Ralph T. Finley, Counsel for First National Bank in St. Louis, Plaintiff in Error.

32½ [File endorsement omitted.]

33

Writ of Error.

[Filed Mar. 6, 1923.]

UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Judges of the Supreme Court, State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Missouri at the information of Jesse W. Barrett, Attorney-General of the State of Missouri, and First National Bank in St. Louis, a National Banking Association, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said First National Bank in St. Louis, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if

34 judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 6th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Edwin R. Durham, Clerk, by F. J. Framme, D. C., Clerk District Court United States for the Central Division for the Western Judicial District of Missouri. [Seal

of the United States District Court of Missouri, Central Division, Western District.]

Allowed March 6th, 1923. A. M. Woodson, Chief Justice Supreme Court of the State of Missouri.

[File endorsement omitted.]

STATE OF MISSOURI, ss:

In obedience to the command of the within writ of error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the case of State of Missouri by Jesse W. Barrett, Attorney General of the State of Missouri, Ex Inf., vs. First National Bank in St. Louis, Respondent, No. 23,753, together with all things concerning the same, so far as called for in the Præcipe filed by respondent, First National Bank in St. Louis, herein.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of Missouri, this 19th day of March, 1923. J. D. Allen, Clerk of the Supreme Court of the State of Missouri. [Seal of the Supreme Court of Missouri.]

In the Supreme Court of Missouri.

[Title omitted.]

Bond on Writ of Error.

Know all men by these presents, that we, First National Bank in St. Louis, as Principal, and St. Louis Union Trust Company, as Surety, are held and firmly bound unto the State of Missouri in the sum of Five Thousand Dollars (\$5,000.00), to be paid to the said State of Missouri, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of March, 1923.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to
35a reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Missouri:

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect. First National Bank in St. Louis, by F. O. Watts. Attest, J. S. Calfee, Secretary. [Seal.] St. Louis Union Trust Company, by Isaac H. Orr. Attest: Wallis G. Rowe, Secretary. [Seal.]

Bond approved and to operate as a supersedeas. Dated March 6th, 1923. A. M. Woodson, Chief Justice of the Supreme Court of the State of Missouri.

36 & 37

Citation and Service.

[Filed Mar. 6, 1923.]

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States to the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Missouri, wherein the First National Bank in St. Louis is plaintiff in error and the State of Missouri at the information of Jesse W. Barrett, Attorney General of the State of Missouri, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Missouri, this 6th day of Mar., 1923. A. M. Woodson, Chief Justice of the Supreme Court of the State of Missouri. Attest: J. D. Allen, Clerk Supreme Court, State of Missouri.

38

[File endorsement omitted.]

The State of Missouri, by the undersigned, Jesse W. Barrett, Attorney General of the State of Missouri, hereby acknowledges due service of the within citation. Jeff. City, March 6, 1923. Jesse W. Barrett, Attorney General, by Merrill E. Otis, Asst. Atty. Gen'l.

39

In the Supreme Court of Missouri.

[Title omitted.]

Præcipe for Transcript.

[Filed Mar. 8, 1923.]

To the Clerk of the Supreme Court of Missouri:

You will please prepare a certified copy of the transcript of the record upon the writ of error allowed in the above entitled cause on the 6th day of March, 1923, for a review of the judgment in said cause by the Supreme Court of the United States and include therein the following papers and documents:

1. The information in the nature of quo warranto filed herein on the 27th day of June, 1922.

2. Order to show cause issued herein on the 28th day of June, 1922.

3. Temporary restraining order entered herein on the 28th day of June, 1922.

4. Motion of respondent filed August 23, 1922, to dissolve the temporary injunction issued herein.

40 & 41 5. Motion of respondent filed September 8, 1922, to quash and dismiss the alternative writ or order to show cause.

6. Demurrer filed by the respondent herein on the 24th day of October, 1922, to the information filed herein.

7. The submission of said cause to the Court.

8. Opinion of the Supreme Court of Missouri.

9. Judgment of the Supreme Court of Missouri.

10. Original petition for writ of error and order allowing same.

11. Original assignment of errors.

12. Copy of supersedeas bond.

13. Original citation on writ of error and acknowledgment of service.

14. Original writ of error with allowance thereof.

15. Return to the writ of error.

16. Your certificate of lodgment.

17. Præcipe for transcript.

18. Your certificate of authentication of the record.

James C. Jones, Frank H. Sullivan, James C. Jones, Jr., Attorneys for First National Bank in St. Louis, Respondent.

Service of the foregoing præcipe for transcript is hereby acknowledged on behalf of the State of Missouri this 8th day of March, 1923. Jesse W. Barrett, Attorney General.

42 [File endorsement omitted].

43

Certificate of Lodgment.

Supreme Court, State of Missouri, ss.

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that there were lodged with me as such Clerk on March 6th, 1923, in the matter of State, ex rel. Barrett, Attorney General, Relator, vs. First National Bank in St. Louis, Respondent:

1. The original bond, of which a copy is herein set forth.

2. Two copies of the writ of error, one for the relator and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Jefferson City, Missouri, this 6th day of March, 1923. J. D. Allen, Clerk Supreme Court of Missouri. [Seal of the Supreme Court of Missouri.]

Clerk's Certificate to Transcript.

Supreme Court, State of Missouri, ss.

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record, proceedings and orders in the case of State of Missouri by Jesse W. Barrett, Attorney-General of the State of Missouri, Relator, vs. First National Bank in St. Louis, Respondent, No. 23,753, so far as called for by the Præcipe filed herein by Respondent, First National Bank in St. Louis, on the 8th day of March, 1923, and made a part hereof as fully and completely as the same appear of record or on file in my office.

I do further certify that the original writ of error, together with my return thereto, and the original citation and acknowledgment of service thereon are hereto attached and herewith returned.

I do further certify that no Præcipe for any additional portions of the record herein has been filed by the State of Missouri, the Relator herein, up to the time of the making of this certificate.

In testimony whereof, I have hereto set my hand and affixed the seal of said Supreme Court, at my office in the City of Jefferson, State as aforesaid, this 19th day of March, 1923. J. D. Allen, Clerk of the Supreme Court of the State of Missouri. [Seal of the Supreme Court of Missouri.]

Endorsed on cover: File No. 29,469. Missouri Supreme Court. Term No. 919. First National Bank in St. Louis, plaintiff in error, vs. State of Missouri at the information of Jesse W. Barrett, attorney general. Filed March 22nd, 1923. File No. 29,469.



FILE COPY

MAY 31 1923

WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

**FIRST NATIONAL BANK
IN ST. LOUIS,**

Plaintiff in Error,

vs.

**STATE OF MISSOURI, Upon Infor-
mation of JESSE W. BARRETT,
Attorney-General,**

Defendant in Error.

No. 919:

252

**MOTION OF PLAINTIFF IN ERROR TO
ADVANCE FOR REARGUMENT.**

**JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,**
For Plaintiff in Error.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK
IN ST. LOUIS,

Plaintiff in Error,

vs.

STATE OF MISSOURI, Upon Infor-
mation of JESSE W. BARRETT,
Attorney-General,

Defendant in Error.

No. 919.

**NOTICE OF MOTION TO ADVANCE FOR
REARGUMENT.**

The State of Missouri is advised that on the *4th*
day of June, 1923, the plaintiff in error will present
to the Supreme Court of the United States at Wash-

ington, D. C., a motion to advance the above-entitled cause, a copy whereof is herewith handed you.

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
For Plaintiff in Error.

Service of the foregoing, with a copy of said motion, is hereby acknowledged.

~~The defendant in error joins in the request of the plaintiff in error in this respect.~~

STATE OF MISSOURI,

By.. *Merrill E. Oltz*
Assistant Attorney-General.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK
IN ST. LOUIS,

Plaintiff in Error,

vs.

STATE OF MISSOURI, Upon Infor-
mation of JESSE W. BARRETT,
Attorney-General,

Defendant in Error.

} No. 919.

**MOTION OF PLAINTIFF IN ERROR TO
ADVANCE FOR REARGUMENT.**

And now comes the plaintiff in error and respectfully shows to the Court:

(1) On the application of the plaintiff in error, this cause was advanced and ordered docketed for argument April 30, 1923; and, in due course, was thereupon argued.

(2) Subsequently it was ordered restored to the docket for reargument at the October Term, 1923,

upon one only of the questions arising upon the record, to wit, the power of the state to "institute and maintain a proceeding to question compliance of a national bank with its charter."

(3) This is an important question, for various and apparent reasons, concerning the fundamental relations of state and national governments.

(4) The interventions in the case, as now appearing upon the record, of various states through their Attorneys-General, and various national banks through their counsel, show the wide spread interest in the case as a whole, and the questions with which it deals.

(5) The State of Missouri is a party hereto and under Sec. 949, Rev. Stats. (Sec. 1581, U. S. Comp. Stats. for 1916), this cause is entitled to a hearing in advance of all civil causes between private parties now pending on the docket of this court.

(6) Shortly prior to the institution of this proceeding, the plaintiff in error opened, established and equipped in the City of St. Louis, a branch office for the conduct of a portion of its banking business, and equipped leaseholds at three other points in said city for the same purpose and provided the necessary equipment and clerical force for those as well—aiming at the extension of its banking business and the better accommodation of its customers and the public. These places have not been opened for busi-

ness because of an injunction granted by the state court when this proceeding was instituted.

The plaintiff in error, therefore, respectfully asks that the cause be advanced and ordered docketed for reargument in October or November, 1923.

Respectfully submitted,

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
For Plaintiff in Error.

State of Missouri, }
City of St. Louis. } ss.

F. O. Watts, of the City of St. Louis and State of Missouri, being duly sworn, upon his oath, states that he is president of the First National Bank in St. Louis; that he has read the foregoing motion to advance, and the matters and things therein set forth are true as he truly believes.

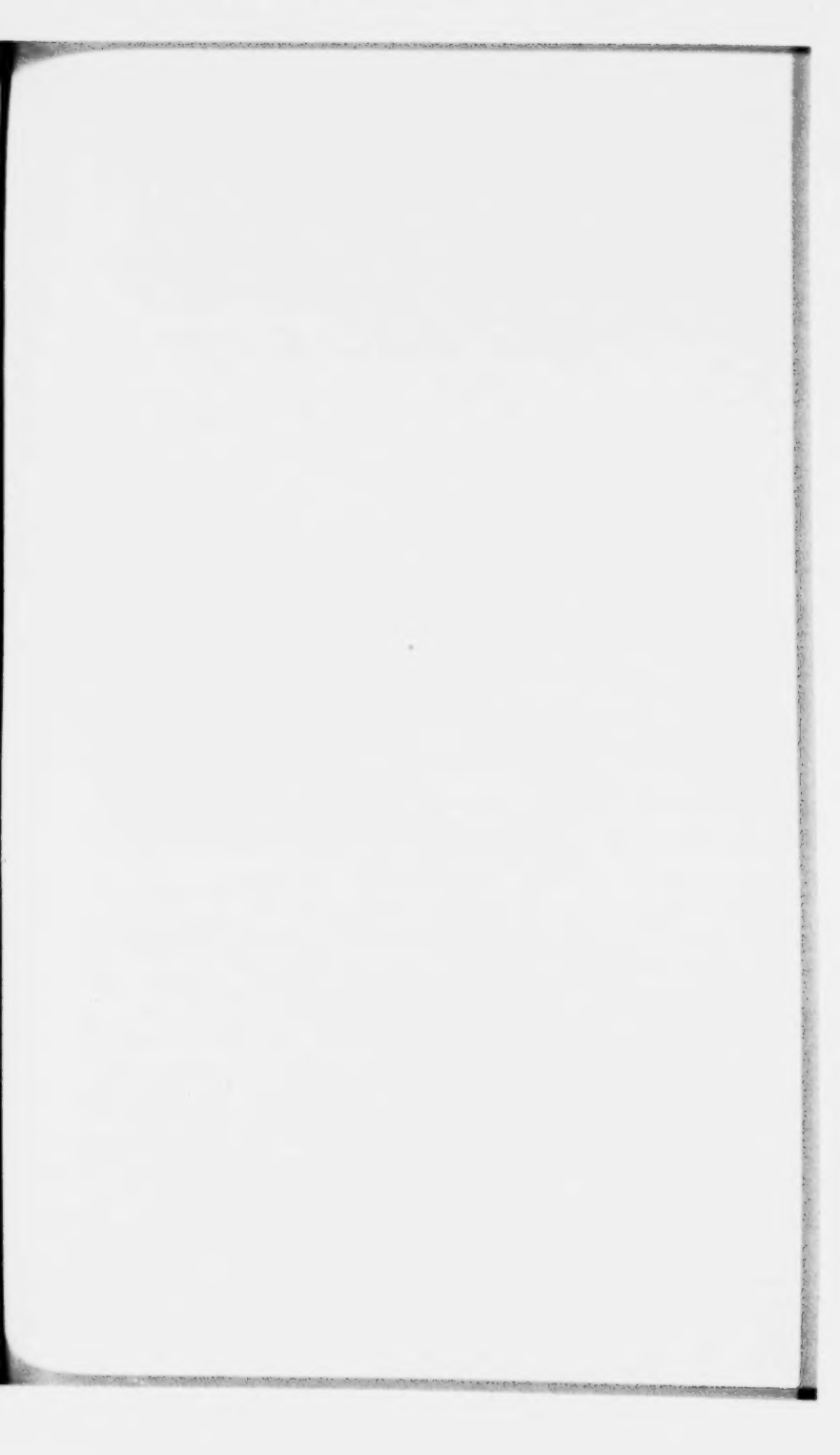
.....

Subscribed and sworn to before me this day
of May, 1923.

My commission expires.....

.....

Notary Public.





MAR 28 1923

No. ~~919~~ 252

WM. R. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST. LOUIS,

Petitioner,

vs.

STATE OF MISSOURI ex inf.

JESSE W. BARRETT,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI AND BRIEF
IN SUPPORT THEREOF.**

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
Counsel for Petitioner.



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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST. LOUIS,	}
vs.	
STATE OF MISSOURI <i>ex inf.</i>	
JESSE W. BARRETT,	
	Petitioner,
	Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI AND BRIEF
IN SUPPORT THEREOF.**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, First National Bank in St. Louis, presents this its petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Missouri, in the certain cause lately depending therein, numbered of that court 23,753, and therein entitled,

State of Missouri, *ex inf.* (sometimes *ex rel.*) Jesse W. Barrett, Attorney-General, v. First National Bank in St. Louis, respondent, and for cause therefor respectfully represents:

1. On June 27, 1922 (Rec. p. 1), the State of Missouri, through its Attorney-General, Jesse W. Barrett, filed in and presented to the Supreme Court of the State of Missouri its information, in which it was averred: That the petitioner, First National Bank in St. Louis, is a banking association organized under the laws of the United States; that its charter (meaning articles of association) and organization certificate specified the City of St. Louis, in the State of Missouri, as the place in which its banking business should be conducted; that for a number of years petitioner's banking house had been located on a certain corner in that city; that recently it had opened a branch office or bank at another named place in the City of St. Louis, and was also conducting the banking business at that point, receiving deposits, honoring checks, discounting bills, etc.

That petitioner proposed to establish other similar places for similar functions at other points in the City of St. Louis; that petitioner was without authority under the laws of the United States to have but a single banking house; that its acts in the premises were in contravention of the laws of the United States and of the State of Missouri.

The prayer was that, pending the cause, an injunction issue, and that upon final hearing petitioner be ousted of the franchise of maintaining branch offices for its banking business in the City of St. Louis.

2. On the day following (Rec., p. 7), the Court issued its alternative writ, demanding that petitioner appear and show cause on a day named by what authority it assumed to operate branch offices for the conduct of its banking business in the City of St. Louis.

3. At the same time (Rec., pp. 9-10) the Court without notice to petitioner, issued an injunction, restraining petitioner from establishing or conducting such branches (other than the one previously established) until the final determination of the cause.

4. On August 23, 1922 (Rec., p. 12), petitioner made and filed in the Supreme Court of Missouri its motion to dissolve this temporary injunction, because the same had been issued in violation of the terms of Revised Statutes of the United States, Sec. 5242, providing that no court of a State shall issue an injunction against a national banking association "before final judgment." No notice of this motion was taken by the Court, then or thereafter.

5. On September 8, 1922 (Rec., p. 14), petitioner made and filed in that court its motion to quash and

dismiss the alternative writ, on the ground that neither the State of Missouri nor the Attorney-General of that State possessed power to institute proceedings concerning the violation or alleged violation of the charter powers of the petitioner.

6. On October 24, 1922 (Rec., pp. 15-16) petitioner filed its demurrer to the information, in which it asserted that the information stated no facts entitling the State or the informant to relief; that the Court was without jurisdiction; that the matters complained of were such as only the Government of the United States could inquire into or complain of.

7. On the first day of November, 1922 (Rec., p. 18) the cause was argued at the bar of the Court.

8. On March 3rd, ¹⁹²³~~1922~~, the Court promulgated its opinion (Rec., pp. 19-20), holding that the State of Missouri had the power to restrain petitioner within the limits of the powers conferred upon it by the laws of the United States and that, under such laws, petitioner had no power to have more than one banking office or place of business within the City of St. Louis.

9. On the same day the Court pronounced final judgment (Rec., p. 19), ousting petitioner from the privilege of conducting any branch bank in the City of St. Louis.

10. The petitioner has sued out a writ of error to this Court from said judgment, but is advised by its counsel that some of the questions arising upon the record are not, or may not be, properly determinable upon the writ of error, and hence, to the end that this Court may consider of the cause upon its merits, it asks the allowance of a writ of *certiorari*.

11. In support of which application, petitioner assigns the following errors:

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Missouri was without jurisdiction to hear and determine this proceeding, or to award the relief sought by the State.

II.

The provisions of the acts of Congress conferring jurisdiction on the courts of the States, over actions against National Banking Associations (Section 57, Chapter 106, 13 Statutes at Large 116; and Section 24, Chapter 231, 36 Statutes at Large 1092) have no application to extraordinary, prerogative writs, such as here involved, and the Supreme Court of Missouri was without jurisdiction to entertain this proceeding.

III.

The Supreme Court of Missouri erred in holding and determining that the State of Missouri possessed visatorial powers over the petitioner, with respect to the manner of its exercise of its franchise as a banking association under the laws of the United States.

IV.

The Supreme Court of Missouri erred in holding and determining that the State of Missouri possessed the power to restrain petitioner by the writ of *quo warranto*, or a writ of that nature, in the exercise of a power claimed by petitioner to be granted it by the laws of the United States.

V.

The petitioner, being a banking association, organized and existing under the laws of the United States, and claiming and asserting under the acts of Congress relating to banking associations so organized, the right to establish branch banking offices within the limits of the City of St. Louis (its place of business designated in its charter), only the Government of the United States possesses the power to restrain the petitioner in respect thereto, and the Supreme Court of Missouri erred in determining otherwise.

VI.

The franchise or right asserted by the petitioner (of having branch offices or banks in the city designated in its articles of association as its place of business) being one granted or grantable only by the Government of the United States, therefore, only

the Government of the United States has the right or power to restrain the petitioner in the use of such asserted franchise or right, and the Supreme Court of Missouri is in error in holding and determining that the State of Missouri has the right so to do, in the manner in which it is attempted in this case.

VII.

The petitioner, having been created a banking association under the laws of the United States, the State of Missouri may not control the petitioner in the exercise of its corporate franchises, except to the extent authorized by act of Congress, and such control, in the manner in which it is attempted in this case, has not been so authorized.

VIII.

Neither the State of Missouri, nor the Attorney-General of the State of Missouri, had the power or authority to question the right of petitioner under its charter and the laws of the United States to establish and operate branch offices or banks in the City of St. Louis, State of Missouri.

IX.

Under its charter and the acts of Congress relating to National Banking Associations, the petitioner

was and is possessed of power to establish and maintain branch offices or branch banks within the limits of the City of St. Louis, in the State of Missouri, and the Supreme Court of Missouri erred in holding and determining to the contrary.

X.

If the opinion of the Supreme Court of Missouri is to be interpreted as holding that Sections 11,684 and 11,737 of the Revised Statutes of Missouri of 1919 are effective to restrict the powers of the petitioner derived from acts of Congress, or to authorize the State to maintain this proceeding, then such statutes are in violation of the Constitution of the United States—in the one aspect as legislation with respect to a subject-matter as to which only Congress may legislate; in the other as an attempt to confer upon the State prerogative rights of sovereignty which inhere only and exclusively in the National Government.

XI.

The writ here invoked, being a discretionary writ, the discretion applicable, being inherently a national discretion, the State, having obtained and insisted on maintaining a temporary injunction in violation of the plain provisions of an act of Congress, and equally

plain decisions of this and other courts upholding and enforcing it (R. S. U. S. 5242, *Bank v. Mixter*, 124 U. S. 721; *Van Reed v. Bank*, 198 U. S. 554; *Hazen v. Bank*, 70 Vt. 543; *Freeman v. Bank*, 160 Mass. 865; *Meyers v. Bank*, 10 Idaho, 175; *Dennis v. Bank*, 127 Cal. 453; *Bank v. Bank*, 40 Md. 269; *nem. con.*), and against efforts of the petitioner to dislodge it, by appealing to that act and those adjudications—in the exercise of a proper discretion here, upon a matter which concerns alone the National Government, the judgment should be reversed, with directions to dismiss the writ, because of the manner in which the State has proceeded; and to the end that the right of the petitioner, under its national charter, may be the subject of orderly investigation by the Government, to which alone the petitioner owes allegiance in the respects here under investigation.

wherefore, the petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, requiring and directing the said Supreme Court of the State of Missouri, by and upon a date certain to be designated therein, to certify and send to this court a full, true and complete transcript of the record and proceedings in said Supreme Court of the State of Missouri, in the cause lately pending therein, entitled *State of Mis-*

souri, upon the information (or relation) of Jesse W. Barrett, Attorney-General, v. First National Bank in St. Louis, respondent, and numbered upon the docket of said court 22,753; to the end that the same may be reviewed by this Honorable Court; that the judgment of the Supreme Court of Missouri in said cause may be reversed for manifold and manifest errors therein appearing; and that the petitioner may have such other relief upon said writ, and in respect to said cause and judgment, as right and justice may require.

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
Attorneys for Petitioner.

United States of America. }
State of Missouri, } ss.
City of St. Louis. }

Frank H. Sullivan, being duly sworn, deposes and says, that he is one of the counsel for the petitioner herein; that he prepared the foregoing petition and knows its contents, and that the statements therein contained are true as he verily believes.

FRANK H. SULLIVAN,

Subscribed and sworn to before me this 20th day of March, 1923.

My commission expires October 5, 1923.

MARY A. ANGERT,
Notary Public.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

It is not our intention to do more, at this time, than indicate the questions which inhere in this controversy; with no more argument, or citation, than is deemed necessary to enable the Court to determine the propriety of this application.

They are:

1. Whether a *state court* has jurisdiction of a high prerogative writ, such as here concerned, addressed to a banking association organized under the laws of the United States, *at the suit of whomsoever*.

2. Whether the *State* may exercise the sovereign right of restraining a *national bank* within the limits, or the supposed limits, of the powers conferred upon it by the General Government.

3. Whether a *state statute*, if interpreted as an attempt to *prohibit national banks* from maintaining branch offices in the cities in which their business is conducted, is a valid enactment, having in view the source of the corporate powers of such institutions.

4. Whether, under the acts of Congress, relating to national banking associations, such an institution

possesses power to establish, in the city designated in its charter and certificate as its place of business, branch offices for the better conduct of its business and accommodation of its patrons and the public. That these are each and all federal and national questions of the most fundamental character goes without saying. Under Judicial Code, Sec. 237, as amended by act of December 23, 1914, and of September 6, 1916 (Comp. Stat. United States, Sec. 1214; 36 Stat. 1156, Sec. 237; c. 2, 38 St. 790; Sec. 2, 39 St. 726), the scope of a *writ of error* is limited to the "validity of a * * * statute of or authority exercised under the United States," which has been denied; or where a statute or authority exercised under a state is claimed to be repugnant to the laws of the United States, but has been sustained. *Federal questions otherwise* arising are reviewable by the writ of *certiorari*.

Dahmke Walker Milling Co. v. Bondurant;
Lawyers Edition, Advance Opinions, Jan. 16,
1922, p. 114;

Ireland v. Woods, 246 U. S. 323.

It is our desire that the full ultimate merit of this controversy may be considered here. Therefore, and notwithstanding a writ of error has been sued out, we are asking the allowance of the writ of *certiorari*, so no question may remain as to the power of the

Court to fully consider the points to be urged, which seem to us to make for the invalidity of the judgment pronounced by the State Court.

1. The naked question of jurisdiction of the State Court is one which is not free from difficulty. *If the Government of the United States* had instituted this proceeding in the Supreme Court of the State, the power of that court to entertain the cause and delimit the powers of the bank under the acts of Congress, as between the sovereignty which created the bank and the bank itself, is a question of some doubt.

It was said by Mr. Justice Day, in *Van Reed v. People's National Bank*, 124 U. S. 721, in effect, that jurisdiction by state courts over national banks exists only to the extent that it has been authorized by Congress.

R. S. U. S. Sec. 5198, and the act of July 12, 1882 (U. S. Comp. St. 1916, Sec. 9668), mentioned by the Supreme Court of the State in this connection, are, it must be admitted, expressed in broad terms. Still, it may well admit of doubt whether Congress intended to confer upon the state courts jurisdiction of the extraordinary prerogative proceedings, such as was invoked in this case, even in a suit brought by the Government of the United States. Especially is this true in view of the terms of the 16th sub-

division of Section 24 of the Judicial Code (Comp. St. Sec. 991 Sub. 16), making plain and adequate provision for proceedings such as here by the National Government against its banking associations in its own courts. Probably the intention of Congress was, for convenience sake, to confer jurisdiction on the courts of the states only as to such ordinary litigation to which national banks might be parties. The intention to invest them with power to determine high prerogative writs such as here concerning the functions of national banks may well be doubted.

2. The opinion of the State Supreme Court is obscure with respect to the state statutes mentioned in the opinion (R. S. Mo. 1919, Sees. 11684 and 11737). These statutes are part of the system regulating the operations of *banks chartered under the law of the state*. So interpreted, they are valid (presumably) whether commendable or otherwise. But in the discussion of the charter powers of a national bank; or of the right of the state to exercise supreme sovereignty with respect thereto, or with respect to the exercise thereof, these statutes simply have no place.

The powers of national banks are drawn exclusively from another source than state legislation, and the latter can neither confer nor restrain these. While the State, in legislating for the community, may enact regulations which are binding upon national banks

in their private relations with the community (and cases of that type are cited by the state court as the basis for its judgment), it is not within its power to amend, restrain or limit the charter powers of such, or regulate their exercise, because these are drawn from another source. Some of the cases so declaring will be presently cited when we come to deal with the right of the State to maintain this proceeding.

3. The question of the right of the State to take over the functions of the National Government in the manner in which it has been attempted in this case; and by use of a writ, an unquestioned prerogative of the sovereign to which the petitioner owes supreme allegiance, restrain the petitioner in the exercise of its corporate functions, and assume to delimit the boundaries of its charter, is a question which was made and settled in principle, adversely to the right, almost at the inception of our National Government.

The function of the writ of *quo warranto*, or the information which is the modern substitute, was dealt with by this Court in *Ames v. Kansas*, 111 U. S. 460. As there explained it was a "*writ of right by the King*," against one who had usurped franchises or liberties, which the King might have granted, but asserted that he had not. With the Declaration of

Independence, and the formation of our dual sovereignty, the rights of the Crown passed to the new sovereign. But which sovereign? It is not possible for both the State and the General Government to be supreme in the same field and with respect to the same subject matter. Sovereignty cannot be concurrent, else it is not sovereignty. This whole matter was fought out and put at rest in *McCulloch v. Maryland*, 4 Wheat. 316, and *Osborne v. United States Bank*, 9 Wheat. 738, upon enunciations often since followed and applied. Those landmarks in our judicial history did more than deny the power of the State to tax a bank created by the United States. They dealt fundamentally with the relations of the two governments; and the relations of the state government to a bank chartered by the general government. There is not a line or syllable in either opinion which does not negative the power which has here been asserted and maintained. The remarks of Mr. Justice Swayne, speaking for the Court in *Farmers etc. Bank v. Dearing*, 91 U. S. 34, are to the same effect. In *Territory v. Lockwood*, 3 Wall. 238, it was held that the writ of *quo warranto* as a motion from an office under the federal government, could be instituted only by that government. In *McClung v. Silliman*, 6 Wheat. 603, the right of a state court to direct a writ of *mandamus* to the

Register of an United States land office was denied. In *Ableman v. Booth*, 21 How. 516, Mr. Chief Justice Taney graphically stated that the power of the state to interfere with functions of the Federal Government, or matters committed to its charge, was exactly equal to, but no greater than its power to interfere with matters happening beyond its geographical boundaries. Upon such considerations, in *State v. Bowen*, 8 S. C. 400, the Supreme Court of that state denied the power of the state, through such a writ as here, to remove a presidential elector from office, although the claim made was that he was not in fact an elector. The Supreme Court of Errors and Appeals of Connecticut in *State ex rel. Attorney-General v. Curtis*, 35 Conn. 374, in an unanswerable opinion, denied to that state the power which the Supreme Court of Missouri have here asserted in behalf of that sovereignty.

In *First National Bank v. Union Trust Company*, 244 U. S. 418, the members of the court, while in disagreement as to whether by express enactment Congress had given the state the right to proceed in that case and in relation to the power there asserted, were a unit in the view that, unless Congress had authorized the state to restrain a national bank within the asserted limits of its charter, the state had no right to attempt to do so. In respect to

the subject matter here under inquiry, no such right has been conferred by Congress upon the state.

Are there those who would contend that the general government might thus attempt to restrain within the supposed limits of the legislative grant, corporations created by the state? And if not, what considerations make for the denial of the power in the one case which do not equally apply in the other?

That the United States might, or may, maintain such a proceeding as here to delimit the corporate powers of this bank, and restrain the activities thereof within the limits thus defined, goes without saying. That such is the exercise of a supreme sovereign power is equally manifest. Under our form of government it is fundamentally impossible that supreme sovereign power as to the same subject matter may rest both in the National Government and that of the state. In the infancy of the Republic, it was the anxious duty, but high prerogative of this Court to declare these fundamentals with respect to the relations of the national and state governments, on the due respect for which the perpetuity of our institutions must depend.

The present necessity of again enforcing them may be of service in this hour of social unrest.

The argument advanced by the state court on the question is specious, but not sound. It is that Congress has not conferred the asserted power upon

the bank; its exercise is contrary to the laws of the state, hence the state may interfere to prevent its exercise. In its ultimate analysis, this position is equivalent to the assertion that where, upon judicial inquiry, it is found that the asserted power has been granted a national bank, only the National Government can conduct the inquiry. But where it has not been granted, the state may intervene. Under this reasoning, the prosecution of *ill-founded* proceedings of this type is the exclusive function of the National Government; those which are *well-taken* are among the functions pertaining to the state.

4. The question presented on the merits is this:

May a national bank have *more than one place of business* within the county, city, town or village where, by its certificate of organization, it is authorized to do business?

The only requirement with regard to the bank's place of business is found in R. S. 5134 (Comp St., Sec. 6959) that the certificate of organization shall specify:

“2. The *place* where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village.”

“Place” means the town or city, and not the office or building, where the business is carried on.

McCormick v. National Bank, 165 U. S. 538,
l. c. 549 (s. c.), 162 Ill. 100, 44 N. E. 381,
61 Ill. at 30.

The only other pertinent provision is found in R. S. 5190 (Comp. St., Sec. 9744), which reads:

“The *usual business* of each national bank shall be transacted at *an office or banking house* located in the *place* specified in its organization certificate.”

The Supreme Court of Missouri makes the fundamental error of construing this provision as a limitation of the number of offices or banking houses which a national bank may maintain in the place where it is authorized to do business. The question turns on the proper construction to be given to the particular words, “an office or banking house.” The Missouri court construed these words as though they were written:

“The usual place of business of each national bank shall be transacted at *one office or one banking house* located in the *place*,” etc.

A national bank has a *charter right* to do business at *any location* within the designated county, city, town or village. This charter power did not, in ex-

press terms, limit the bank to *one location* within the designated county, city, town or village. If it had been the congressional intent to so limit the bank to one location, it would have been quite easy to have said "*one office*" or "*one banking house*," as the Missouri court now says for it.

The indefinite article "a" or "an" is not usually a word of limitation.

"As by its derivation, so also in meaning, *an* or *a* is a weaker or less distinct *one*.

"Usually, as the indefinite article proper, it points out, in a loose way, as one of a *class* containing *more* of the *same kind*." (*Century Dictionary*).

The Constitution of Arkansas provides that for each circuit "*a* judge shall be elected."

The Arkansas Legislature passed an act providing for "*an additional judge*" for the Sixth Circuit.

The Attorney-General filed *quo warranto*, alleging that the act was unconstitutional, and contended that the letter "a" before the word "Judge" in the constitution was "*a limitation upon the power of the Legislature to provide for more than one Judge in a judicial circuit.*"

The Court, in refusing the writ, said (*State ex rel. v. Martin*, 60 Ark. 343, 28 L. R. A. 153):

“Now the adjective ‘a,’ commonly called the ‘indefinite article,’ and so called, too, because it *does not define any particular person or thing*, is entirely too indefinite, in the connection used, to define *or limit the number* of judges which the legislative wisdom may provide for the judicial circuits of the state. And it is perfectly obvious that its office and meaning was well understood by the framers of our constitution, for nowhere in that instrument do we find it used as a *numerical limitation*. * * * According to Mr. Webster ‘a’ means ‘one’ or ‘any,’ but less ‘emphatically than either.’ It may mean one where only one is intended. That is the trouble. *Of itself it is in no sense a word of limitation*. * * * The constitution requires ‘a judge’ for each circuit, and there must be *at least one judge*. *But where is the limitation* upon the Legislature to provide for more if the necessity arises. * * *

The Supreme Court of Massachusetts says:

“The article ‘a’ is not necessarily a singular term. It is often used in the sense of ‘any’ and is then applied to more than one individual object.”

National Union Bank v. Copeland, 171 Mass. 257, 4 N. E. 794;

See Thompson v. Association, 8 Common Bench Reports 848;

European Cent. R. Co. v. Westall, 6 Best & Smith 970.

The Congress, in enacting this section, was dealing with two classes of business done by national banks, the "usual" and the "unusual." As to the latter, the *unusual business*, this section impliedly recognizes the practice—indeed, the necessity—of doing this where the occasion and conditions call for it to be done. As to the former, its *usual business*, the regulation is that this shall be done at the *place* (*i. e.*, the city, town or village) designated in its organization certificate and at an office or banking house, *i. e.*, a place of business. This section does not *inhibit* more than one *place of business*.

A national bank is authorized to do the "business of banking" within a designated county, city, town or village. (See Section 9661 [R. S. 5136].)

This is part of its *express powers*.

But it also has implied or unexpressed powers "such *incidental powers* as shall be necessary to carry on the business of banking" (Section 9661, R. S. 5136).

Implied powers include not merely what is *strictly necessary*, but whatever, *not being expressly prohibited*, may "fairly be regarded as *incidental* to the *objects* for which the corporation is created."

Green Bay R. R. v. Steamboat Co., 107 U. S. 98, 100.

An implied power is one that is “*needful, suitable and proper* to accomplish the *object* of the grant, and one that is directly and immediately *appropriate* to the execution of the specific powers” granted.

People v. Pullman P. C. Co., 175 Ill. 125, 136.

“A power which is obviously *appropriate and convenient* to carry into effect the franchise granted has always been deemed a *necessary* one.”

State v. Hancock, 35 N. J. L. R. 537, 545.

That the privilege of maintaining two or more offices or banking houses is clearly needful, suitable and proper, and appropriate and convenient, to the exercise of the banking business, is *demonstrated* by the frequent exercise of this privilege by state banks and trust companies in many of our larger business centers.

A privilege successfully exercised by banks organized under state governments is certainly *suitable, proper, appropriate and convenient* to a like institution organized under an act of Congress.

The implied powers of the Constitution have grown and developed with the growth and development of our country and our civilization. Like growth should be an incident of the *implied powers* of a national

bank or other corporation, for these mean, as shown, what *is, or has become*, suitable, appropriate or convenient.

“The authority of a corporation to perform a particular act is always dependent to a very considerable extent upon the facts and circumstances *at the time when it is proposed to perform the act.*”

7 R. C. L. 513.

Respectfully submitted,

JAMES C. JONES,

LON O. HOCKER,

FRANK H. SULLIVAN,

EUGENE H. ANGERT,

Counsel for Pctitioner.



No. 919 252

WM. R. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN
ST. LOUIS,

Plaintiff in Error and Pe-
titioner in Certiorari,

vs.

STATE OF MISSOURI, UPON INFOR-
MATION OF JESSE W. BARRETT,
Attorney-General,

Defendant in Error and
Respondent in Certiorari.

**MOTION OF PLAINTIFF IN ERROR AND
PETITIONER IN CERTIORARI
TO ADVANCE.**

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
Counsel for Plaintiff in Error and
Petitioner in Certiorari.

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Attorney-General,

Defendant in Error and
Respondent in Certiorari.

**MOTION OF PLAINTIFF IN ERROR AND
PETITIONER IN CERTIORARI
TO ADVANCE.**

MAY IT PLEASE THE COURT:

The State of Missouri, through her Attorney-Gen-
eral, filed before the Supreme Court of that State an
information in quo warranto, asserting that the plain-

tiff in error and petitioner was a national banking association; that, by its articles of association and certificate, the City of St. Louis in that State, was designated as the place where its business activities were to be conducted; that it had in that city a banking house; and had recently opened a branch thereof at another point in the city, and proposed to have still others therein; and that under the Acts of Congress in relation to that subject matter, the plaintiff in error was without authority to maintain such branch offices.

The State Supreme Court held that the State had the right to so proceed; and denied the power of the plaintiff in error to have such branch offices.

The plaintiff in error has sued out a writ of error here; and, in doubt as to the proper basis of review, has also applied for a writ of certiorari.

The plaintiff in error now asks that the cause be advanced for hearing, because—

1. The power of the State to so control national banks is a question which concerns the fundamental relations between the National and State Governments; and, hence, is a question which concerns the United States, all the states of the Union, and all the national banks of the country.

2. This Court has never had occasion to inquire as to the powers of national banks in the regard here in controversy. It is a question in which all the national banks chartered by Congress are vitally interested, as well as their various patrons and the public at large, in all the cities and towns of the country where such institutions are located.

3. The State of Missouri is a party hereto and under Sec. 949, Rev. Stats. (Sec. 1581, U. S. Comp. Stats. for 1916), this cause is entitled to a hearing in advance of all civil causes between private parties now pending on the docket of this court.

4. Shortly prior to the institution of this proceeding, the plaintiff in error opened, established and equipped in the City of St. Louis, a branch office for the conduct of a portion of its banking business; and equipped leaseholds at three other points in said city for the same purpose and provided the necessary equipment and clerical force for those as well—aiming at the extension of its banking business and the better accommodation of its customers and the public. These places have not been opened for business, because of an injunction granted by the State Court when this proceeding was instituted.

The plaintiff in error, therefore, respectfully asks

that the case be ordered advanced upon the docket of the Court.

JAMES C. JONES,

LON O. HOCKER,

FRANK H. SULLIVAN,

EUGENE H. ANGERT,

Counsel for Plaintiff in Error
and Petitioner in Certiorari.

State of Missouri, } ss.
City of St. Louis. }

F. O. WATTS of the City of St. Louis and State of Missouri, being duly sworn, upon his oath states that he is President of the First National Bank in St. Louis; that he has read the foregoing motion to advance and the matters and things therein set forth are true as he truly believes.

(Signed) F. O. Watts

Subscribed and sworn to before me this 23 day
of March, 1923.

My commission expires October 24, 1926

(Signed) H. W. Haisam

Notary Public.

(seal)

No. ~~910~~ 252

WM. R. STANSBURY
CLERK

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vs.

STATE OF MISSOURI Upon Informa-
tion of JESSE W. BARRETT, At-
torney General,

Defendant in Error and
Respondent in Certiorari.

**APPLICATION FOR SUPERSEDEAS OR STAY OF
PROCEEDINGS OR INJUNCTION, WITH
SUGGESTIONS IN SUPPORT.**

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
Counsel for Petitioner.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST.
LOUIS,

Plaintiff in Error and
Petitioner in Certiorari,

vs.

STATE OF MISSOURI Upon Informa-
tion of JESSE W. BARRETT, At-
torney General,

Defendant in Error and
Respondent in Certiorari.

**APPLICATION FOR SUPERSEDEAS OR STAY OF
PROCEEDINGS OR INJUNCTION.**

And now comes the petitioner herein, First National Bank in St. Louis, and respectfully shows to the Court:

1. In this cause the petitioner has sued out a writ of error to this Court from the judgment of the Supreme Court of the State of Missouri, and the record has been returned into this court.

2. In doubt as to whether all the questions arising upon the record are reviewable by this Court upon a writ of error, the petitioner has also applied here for a writ of *certiorari*; and that application is now pending.

3. The petitioner is a banking association, organized and existing under the laws of the United States, and authorized by its articles of association and certificate of incorporation to engage in the banking business in the City of St. Louis, in the State of Missouri.

4. Shortly prior to the institution of this proceeding the petitioner opened, established and equipped, in the City of St. Louis, a branch office for the conduct of a portion of its banking business, and acquired leaseholds at three other points in said city for the same purpose, and provided the necessary equipment and clerical force for those as well—aiming at the extension of its banking business and the better accommodation of its customers and the public.

5. Whereupon the State of Missouri, through its Attorney-General, Jesse W. Barrett, filed before and with the Supreme Court of that state, on June 27, 1922, its information in *quo warranto*, asserting that under the acts of Congress relating to national banking associations the petitioner was without authority

to have and maintain branch offices in St. Louis for the conduct of its banking business; praying an injunction pending the action, and a final judgment ousting the petitioner of the franchise of maintaining such branch offices (Rec., p. 1).

6. On June 29, 1922 (Rec., p. 5), the Supreme Court of Missouri granted its order to show cause.

7. In due course the Supreme Court of Missouri entered its judgment March 3, 1923, ousting the petitioner from the franchise of having or maintaining any such branch offices (Rec., p. 14).

8. At the time the proceeding was instituted, and notwithstanding the inhibitory provisions of R. S. U. S., Section 5242, the state procured from the state court an injunction restraining the petitioner from establishing such branch offices (other than the one then in operation); and maintained the same (notwithstanding the provisions of that statute) until the final determination of the cause against efforts of the petitioner to obtain its dissolution (Rec., p. 7).

9. On allowing the writ of error the Chief Justice of the Supreme Court of Missouri approved a bond and ordered that the writ of error operate as a supersedeas. (Order appears only in record returned

(Note.—All references are to printed record submitted on application for writ of *certiorari*.)

with the writ of error, which has not yet been printed.)

10. The petitioner is advised by its counsel that there is doubt whether a judgment of this character may be stayed, pending the determination of the cause here, except on special order of this Court under R. S. U. S., Section 716 (Judicial Code, Sec. 262, Comp. St., Sec. 1239).

11. Under the judgment of the Supreme Court of Missouri if not superseded, or the enforcement thereof otherwise stayed, the petitioner must dismantle the branch office which it has established, and refrain from so using others which it had acquired for the purpose, to its great financial hurt and detriment (without hope of recompense) pending the time when this Court, in ordinary procedure, may reach and determine this cause.

12. The petitioner is advised by its counsel that under the acts of Congress relating to banking associations, it possesses the power it seeks to exercise; and, also, that an inquiry therein is the sole prerogative of the Government of the United States and not that of the State of Missouri.

Wherefore, the petitioner prays that a writ of supersedeas may issue herein, staying the enforcement of the judgment of the Supreme Court of Mis-

souri pending judgment here; or that an order issue herein staying further proceedings pending the determination of the cause here; or, if deemed more appropriate to the situation, that a writ of injunction issue, directed to Jesse W. Barrett, Attorney-General of the State of Missouri, restraining him, his associates, assistants and subordinates from enforcing the judgment pending final determination of the cause here; and for such other writs and processes as may seem meet and proper in the premises.

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
Counsel for Petitioner.

United States of America, }
State of Missouri, } ss.
City of St. Louis. }

Frank O. Watts, being duly sworn, on his oath says that he is president of the First National Bank in St. Louis, and that he has read, and is familiar with, the foregoing application, and that the facts herein stated are true.

Frank O. Watts.

Subscribed and sworn to before me, this 30th day of March, 1923.

My commission expires October 24, 1926.....

(Signed) H. W. Heddenreich
.....

Notary Public.

(Seal)

**SUGGESTIONS IN SUPPORT OF APPLICATION
FOR SUPERSEDEAS OR STAY OF PRO-
CEEDINGS OR INJUNCTION.**

Under Revised Statutes U. S., Section 1007, as amended (Comp. St., Sec. 1666), a writ of error becomes a supersedeas, upon filing a bond, only in case the judgment is of a type which may be superseded without special order here. (See the observations of Mr. Justice Bradley in *Hovey v. McDonald*, 109 U. S., at page 159 *et seq.*, and of Mr. Justice Waite, in *Leonard v. Ozark Land Co.*, 115 U. S. 467.)

While this Court has recognized a writ of error, with bond, a superseding judgment in *quo warranto* (U. S. *ex rel.* *Crawford v. Addison*, 22 How. 184; *Id. v. Id.*, 6 Wall. 296, and *Foster v. Kansas*, 112 U. S. 204) it is not to be overlooked that those were each proceedings, at the instance of private relators, to determine title to office. The judgments were probably not self-executing. It may well be doubted whether the judgment in the case at bar is controlled by the same considerations. The order of the Chief Justice of the state court cannot change the character of the judgment (*Hovey v. McDonald*, 109 U. S. 150, 161).

But under the broad and elastic provisions of Section 262 of the Judicial Code (Comp. St., Sec. 1239)

this Court, in the exercise of its appellate jurisdiction, may grant a supersedeas, or any other writ appropriate to preserve the rights of parties litigant pending the determination of the cause here. It is a power which has often been exercised. It was availed of in *Hardeman v. Anderson*, 4 How. 640, to allow a supersedeas and suspend the enforcement of the judgment below pending review here, albeit the act of Congress then in force was not nearly so comprehensive in terms as the present statute.

In *Milwaukee Railroad Company ex parte*, 5 Wall. 190, Mr. Justice Miller, speaking for the Court, said:

“The case being properly in this court by appeal, we have, by the fourteenth section of the Judiciary Act, a right to issue any writ which may be necessary to render our appellate jurisdiction effectual. For this purpose the writ of *supersedeas* is eminently proper in a case where the circumstances justify it, as we think they do in the present instance.”

In re Claasen, 140 U. S. 207, Mr. Justice Blatchford said:

“That this court, as a court, has power to issue a writ of *supersedeas* under Section 716 of the Revised Statutes is quite clear, for that section gives it power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable

to the usages and principles of law (*Hardeman v. Anderson*, 4 How. 640; *Ex Parte Milwaukee Railroad Co.*, 5 Wall. 188)."

In re McKenzie, 180 U. S. 549, Mr. Chief Justice Fuller, speaking for the Court, observed:

"That this court, as a court, has power to issue a writ of *supersedeas* under Section 716 of the Revised Statutes is clear, for that section concedes its power to issue writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction and agreeably to the usages and principles of law. * * *

"Although the issue of the writ is not ordinarily required, there are instances in which it has been done, under special circumstances, and in furtherance of justice (*Stockton v. Bishop*, 2 How. 74; *Hardeman v. Anderson*, 4 How. 640; *Ex parte Milwaukee Railroad*, 5 Wall 188)."

In *Omaha etc. Railway Co. v. Interstate Commerce Commission*, 22⁷ U. S. 58⁸, under the authority of this statute, an order was entered suspending the enforcement of an order of the Interstate Commerce Commission, self-executing in terms, and the enforcement of which pending appeal would work injury to the appellant, for which there was no redress.

In *Hartford Life Insurance Co. v. Johnson*, No. 232 of the October Term, 1921, under this statute the prosecution of an action on an appeal bond to the

state court was enjoined pending the determination of an appeal here in an action to enjoin the enforcement of the judgment of the state court to supersede which the bond had been given. No doubt there are other instances of a similar kind with which the Court is familiar but we are not.

The necessity of such relief here is manifest. This bank may be right in its contentions. They are inherently federal questions, and are, therefore, not at rest until this Court has spoken concerning them.

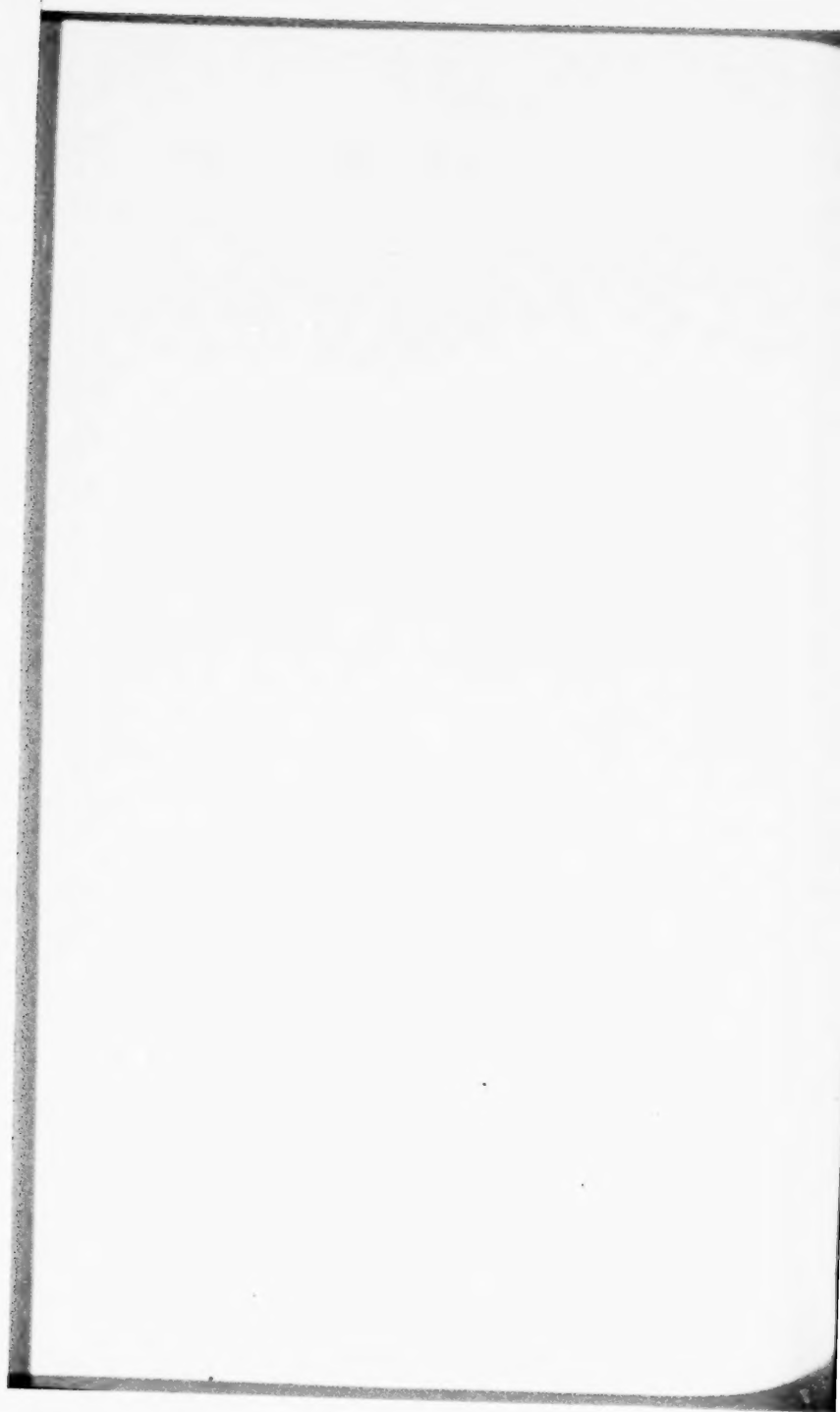
If in the meantime the plaintiff in error must obey the order of the state court its loss is certain, immediate and without hope of return, because the state does not deign to reimburse those whose business activities it may have interrupted through the mistaken zeal of its officials.

A writ of supersedeas or an order staying further proceedings pending the determination of the cause by this Court would seem to suffice, but an injunction directed to the Attorney-General of the state is no invasion of the sovereignty of the state (*Ex Parte Young*, 209 U. S. 149 *et seq.*) and may be the more appropriate remedy.

It is respectfully submitted that one or the other should issue, dependent upon which the Court may

regard as the more appropriate under the circumstances.

JAMES C. JONES,
LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENT H. ANGERT,
Counsel for Petitioner.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK
IN ST. LOUIS,

Plaintiff in Error
(And Petitioner in Certiorari),

vs.

STATE OF MISSOURI, at the
Information of JESSE W. BARRETT,
Attorney-General,

Defendant in Error
(And Respondent in Certiorari).

No. ~~918~~ 252

**BRIEF AND ARGUMENT FOR PLAINTIFF
IN ERROR.**

JAMES C. JONES,
FRANK H. SULLIVAN,

For Plaintiff in Error.

JONES, HOCKER, SULLIVAN & ANGERT,
506 Olive St., St. Louis, Mo.



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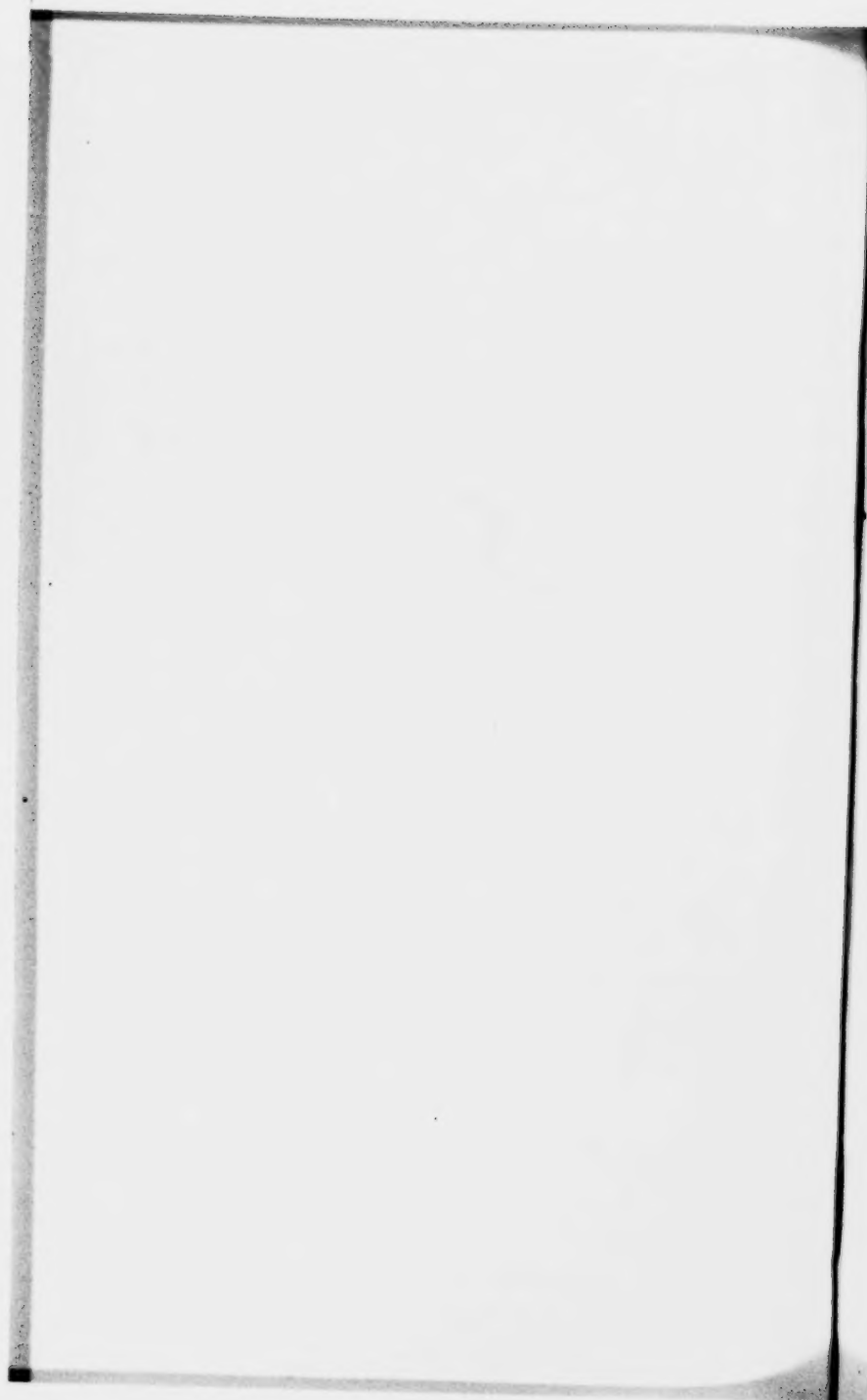
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IN THE
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OCTOBER TERM, 1922.

FIRST NATIONAL BANK
IN ST. LOUIS,
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STATE OF MISSOURI, at the
Information of JESSE W. BARRETT,
Attorney-General,
Defendant in Error
(And Respondent in Certiorari).

No. 919.

**BRIEF AND ARGUMENT FOR PLAINTIFF
IN ERROR.**

STATEMENT.

The Attorney-General of the State of Missouri filed in the Supreme Court of that state an information in quo warranto (Rec., pp. 1-3), wherein it was alleged: That the plaintiff in error was a banking association organized under the laws of the United States; that by its articles of association and cer-

tificate of incorporation the City of St. Louis in Missouri was designated as its place of business; that for a number of years it had conducted its banking business at a designated building in that city; that it had recently opened a branch office at another place within the city, for the transaction of banking business, and contemplated and intended to establish still other such branches in the city, and that the plaintiff in error was without authority of law to have or maintain branch offices for the conduct of its banking business within the City of St. Louis. The prayer was that the plaintiff in error be ousted of the asserted right.

Upon this showing an order to show cause issued (Rec., p. 4). On the prayer of the informant (Rec., p. 3) a temporary injunction issued (Rec., p. 4), restraining plaintiff in error from going forward with its plans to establish branch offices, pending the cause. The plaintiff in error seasonably, but unsuccessfully, asked the dissolution of this injunction as having been obtained in violation of the Revised Statutes of the United States, Section 5242 (Comp. St. 1916, Sec. 9834).

The plaintiff in error also filed its motion (Rec., p. 6) to dismiss the proceeding on the ground that the State and her Attorney-General did not possess the power of visitation attempted to be exercised.

It also submitted a demurrer (Rec., p. 6) in which it contended that the information stated no facts justifying the proceeding; that the Court was without jurisdiction thereof, and that the proceeding was one which only the Government of the United States could maintain.

In due course, and on March 3, 1923, the Court delivered its opinion (Rec., pp. 8-16) and pronounced its judgment (Rec., p. 7) ousting the plaintiff in error of the power and privilege of possessing and operating branch banks.

In apt time (Rec., pp. 17 et seq.) the plaintiff in error sued out its writ of error here, and, in doubt as to the proper method of review, has also applied for a writ of certiorari, which application has been docketed, and ordered to be submitted with the writ of error.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Missouri erred in holding that it lay within the province of the State of Missouri or the Attorney-General of the state to maintain such a proceeding as this to define the powers of a national banking association, and to restrain such an institution within the powers as thus defined (Assignment of Errors Nos. III, IV, VII, VIII, Rec., p. 18; Petition for Certiorari, pp. 6, 7 and 8).

II.

The Supreme Court of the State of Missouri erred in denying the contention of the plaintiff in error that, the plaintiff in error being a national banking association organized under the laws of the United States, the powers asserted by it being those granted or grantable only by the United States, for that reason it was not within the sovereign authority of the State of Missouri to define the powers of the plaintiff in error under its charter or to restrain it in the exercise thereof (Assignments of Error Nos. V, VI and VII, Rec., p. 18; Petition for Certiorari, pp. 8 and 9).

III.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that the proceeding here involved was one of which the Government of the United States has sole and exclusive sovereignty and power; and that, therefore, the state and her Attorney-General were without power or authority to institute or maintain such a proceeding (Assignments of Error V, VI and VII, Rec. p. 18; Petition for Certiorari, pp. 8 and 9).

IV.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that neither the State of Missouri nor the Attorney-General thereof had power or authority to question the right of the plaintiff in error under the laws of the United States to establish and operate branches of its banking business in the City of St. Louis, State of Missouri (Assignments of Error No. VIII, Rec., p. 18; Petition for Certiorari, p. 8).

V.

The Supreme Court of Missouri erred in denying the contention of the petitioner that Sections 11,684 and 11,737 of the Revised Statutes of Missouri of 1919, if interpreted to restrict the powers of national banking associations in the matter of branch offices

or banks, are unconstitutional and void because dealing with a matter within the exclusive province of the Federal Government (Assignments of Error No. X, Petition for Certiorari, p. 9).

VI.

The Supreme Court of Missouri erred in holding and determining that acts of Congress conferring jurisdiction upon state courts over actions against national banking associations (Judicial Code, Section 24, Subdivision 16; R. S. U. S., Sections 5136, 5138, and Act of July 12, 1882, found in Compiled Statutes 1916, Section 9668) conferred authority upon the state, and jurisdiction upon her courts to proceed as here in the exercise of a sovereign power, which is the sole prerogative of the National Government (Assignment of Error II, Rec., p. 18; Petition for Certiorari, p. 6).

VII.

Under its charter and the acts of Congress relating to national banking associations, the plaintiff in error is possessed of power to establish and maintain branch offices in the City of St. Louis for the conduct of its banking business; and the Supreme Court of Missouri is in error in ruling to the contrary (Assignments of Error IX, Rec., p. 18; Petition for Certiorari, p. 8).

**STATE STATUTES REFERRED TO BY THE
MISSOURI SUPREME COURT (REC., P. 15).**

Revised Statutes of Missouri of 1919, Article I of Chapter 108, providing for the establishment of a State Banking Department:

"Sec. 11684. Prohibition of banking business.
—No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise (Laws 1915, p. 108)."

Article II of Chapter 108, providing for the incorporation of banks:

“Sec. 11737. **Rights and powers.**—Every such corporation shall be authorized and empowered:

1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and nonnegotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest: **Provided, however,** that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house.”

BRIEF.

I.

Quo warranto is a writ of right of the sovereign.

Ames v. Kansas, 111 U. S. 460;

Terrett v. Taylor, 9 Cranch. 51.

II.

As addressed to a national banking association to restrain it within the corporate grant, it is the sole prerogative of the National Government.

McCulloch v. Maryland, 4 Wheat. 229 (435);

Osborne v. United States Bank, 9 Wheat. 863;

Farmers etc. Bank v. Dearing, 91 U. S. 30 (33);

Territory v. Lockwood, 3 Wall. 238;

McClung v. Slliman, 6 Wheat. 303;

First National Bank v. Union Trust Co., 244
U. S. 427;

Van Reed v. Peoples National Bank, 198 U. S.
554;

State ex rel. v. Curtis, 35 Conn. 374;

State ex rel. v. Bowen, 8 S. C. 400;

Harkness v. Guthrie, 27 Utah 248 (s. c.) Guthrie
v. Harkness, 199 U. S. 156;

State ex rel. v. Cincinnati etc. Ry. Co. (Ohio), 7
L. R. A. 319.

III.

The State may not exercise sovereign powers which are the exclusive function of the United States.

Cases, *supra*, and
Ableman v. Booth, 21 How. 516;
In re Tarble, 13 Wall. 405;
Tennessee v. Davis, 100 U. S. 263;
Easton v. Iowa, 188 U. S. 220.

IV.

State legislation cannot regulate the charter powers of national banking associations.

McCulloch v. Maryland, 4 Wheat. 316;
Osborne v. United States Bank, 9 Wheat. 738;
Farmers etc. Bank v. Dearing, 91 U. S. 30;
Easton v. Iowa, 188 U. S. 220;
Van Reed v. Peoples National Bank, 198 U. S.
554.

V.

In the sense of independent institutions, plaintiff in error is not charged with establishing branch banks, but merely branch offices of its bank in St. Louis (Rec., p. 1).

VI.

R. S. U. S., Sec. 5190, has reference to the city in which the bank is located, and not to its place of business therein.

McCormick v. Market National Bank, 165 U. S. 549 (s. c.) 162 Ill. 100.

VII.

It is within the incidental powers of a national banking association to have branch offices in the city where its business is conducted, for the enlargement of its banking business, and the better accommodation of its patrons.

Green Bay v. Steamboat Co., 107 U. S. 98;
People v. Pullman etc. Co., 175 Ill. 125;
State v. Hancock, 35 N. J. L. 537;
Gas etc. Co. v. Dairy Co., 60 Ohio St. 96;
Union Bank v. Jacobs, 25 Humph. (Tenn.) 515;
Barry v. Merchants Exchange, 1 Sandf. Chy.
(N. Y.) 280;
Willmarth v. Crawford, 10 Wend. (N. Y.) 341;
Wright v. Hughes, 119 Ind. 324.

VIII.

R. S. U. S., Sec. 5190, requiring a national banking

association to have "an office," is not to be interpreted as forbidding but the office required.

Century Dictionary "a," "an";
United States v. Oregon etc. Railway Co., 164
U. S. 526;
State ex rel. v. Martin, 60 Ark. 343;
National etc. Bank v. Copeland, 171 Mass. 257;
Thompson v. Association, 8 C. B. 848;
European etc. Railway Co. v. Westall, 6 Best
& Smith, 970;
Chicago etc. Ry. Co. v. McCaull-Dinsmore Co.,
253 U. S. 97;
United States v. Alabama etc. Ry. Co., 142
U. S. 615;
United States v. Finnell, 185 U. S. 236;
Swift & Co. v. United States, 105 U. S. 691;
Studebaker v. Perry, 184 U. S. 268.

IX.

There has been no such departmental construction as requires a different ruling.

Merritt v. Cameron, 137 U. S. 550;
United States v. Healy, 160 U. S. 136;
United States v. Philbrick, 120 U. S. 52;
Chicago etc. Railway Co. v. McCaull-Dinsmore
253 U. S. 97;
United States v. Alabama etc. Railway Co.,
142 U. S. 615;
United States v. Finnell, 185 U. S. 236;
Swift & Co. v. United States, 105 U. S. 691;

Studebaker v. Perry, 184 U. S. 268;
State v. Ins. Co., 175 Ind. 59;
Schuyler v. Southern Pacific Co. (Utah), 109
Pac. 458.

X.

The asserted power exists or not, under the law, and
no departmental action being required, abstract de-
partmental rulings have no place in the inquiry.

Authorities, *supra*, and
State v. Mutual Life Ins. Co., 175 Ind. 59;
Schuyler v. Southern Pacific Co., 109 Pac.
(Utah) 458.

ARGUMENT.

The Power of the State in the Premises.

At the threshold of the case, of course, lies the question of the power of the state to proceed by an information in the nature of a writ of quo warranto to delimit and define the powers of a corporation created by the National Government, and to restrain the corporation within the limits, or supposed limits, of its powers as thus defined. That, if such a power exists, it is, or may be, of far-reaching consequences is certain. For if the state may restrain the corporate functioning of national banking associations in the manner here attempted, it will become exceedingly difficult to set any limit to its power in that regard. If it may deny a national banking association the power to have more than one place of business in the state, why may it not deny the power to have any such?

The supremacy of the National Government with respect to corporations created by it in the execution of its constitutional powers cannot admit of question. The question here really concerns the division of sovereignty which lies at the foundation and fundamentals of our system of government.

For the writ here sued out, and the proceeding here instituted, is the exercise of supreme sovereign power. Massachusetts Bay Colony lost her chartered liberties by no other proceeding than that here under review. The judgment there was that the charter be forfeited unto the crown, i. e., that the franchise be restored unto the sovereign which had created the thing and granted the franchise (Wilson's History of the American People, Vol. I, pp. 284-5).

Such is always the effect of the judgment in such a proceeding, if the sovereign prevails.

In *Terrett v. Taylor*, 9 Cranch 51, Mr. Justice Story, speaking for the Court, observed:

“A private corporation created by the Legislature may lose its franchise by a misuser or a nonuser of them; and **they may be resumed** by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture.”

As said by Mr. Justice Waite, speaking for the Court, in *Ames v. Kansas*, 111 U. S. 460;

“The original common-law writ of quo warranto was a civil writ, at the suit of the crown, and not a criminal prosecution (*Rex v. Marsden*, 3 Burr. 1812, 1817). It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties, to in-

quire by what right he claimed them (Com. Dig. Quo Warranto A), and the first process was summons (Id. C. 2). This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo warranto, which, in its origin, was 'a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or **seize it for the crown**' (3 Bl. Com. 263). Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, **seizing the franchise**, or ousting the wrongful possessor; the fine being nominal only' (3 Bl. Com. supra; *The King v. Francis*, 2 T. R. 484; Bac. Ab. Tit. Information D; 2 Kyd on Corp. 439)."

Wherefore the inquiry arises: If this corporation has attempted the exercise of a franchise granted or **grantable** only by the national government, by what authority would the state undertake to seize it?

A proper consideration of the relations between the state and national governments, as defined by this Court when occasion has rendered it necessary, furnishes a plain answer to this inquiry.

The cases of *McCulloch v. Maryland*, 4 Wheat. 316, and *Osborne v. United States Bank*, 9 Wheat. 738, dealt with much more than the power of the states to lay an incidental tax upon the property of a bank

created by the national government. The Court there dealt, as here, with an asserted power, on the part of the state, to regulate, and even to destroy.

For, says Charles Warren in *The Supreme Court in United States History*, Vol. I, p. 503, at the time those cases came to the bar of the Court for consideration this was the situation:

“Indiana in its Constitution of 1816 prohibited the establishment of branches of any bank chartered outside of the state. The Illinois Constitution of 1818 prohibited the existence of any but state banks within the states. In November, 1817, Tennessee imposed a tax of \$50,000 on any other than a state bank doing business in the state; in December, 1817, Georgia laid a tax of 31¼ per cent on every \$100 of bank stock employed within the state (the legislature declaring, by resolve, the next year, that this tax was only intended to apply to branches of the Bank of the United States); North Carolina, in December, 1818, imposed an annual tax of \$5,000 on the branches of the bank. In February, 1818, there was enacted in Maryland a statute laying a heavy stamp tax on all notes issued by banks chartered outside the state, which tax might be commuted by the annual payment of \$15,000; in January, 1819, Kentucky imposed a still heavier tax, compelling each branch in that state to pay \$60,000 annually; the next month, February, 1819, Ohio rivaled Kentucky with a tax of \$50,000 on each branch.”

It was this attempt to regulate, control and forbid the operations of agencies of the Federal Government which furnished the basis for the judgments in those two historic proceedings. How can the power of the state here asserted stand, in the face of this language of Mr. Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 229 (p. 435):

“The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.”

If, as there distinctly declared, the sovereignty of a state does not extend to a national bank, how can this proceeding be maintained, having in mind the fact that it is the supreme exercise of sovereignty?

The doctrine was further elaborated in *Osborne v. United States Bank*, 9 Wheat. 863, and the incapacity

of the state to control national banks declared by the Chief Justice in this language:

"The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

"Were the secretary of the treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so. If, instead of the secretary of the treasury, distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expense, the profits of the banking business, instead of other emoluments to be drawn from the treasury, which banking business was essential to the operations of the government, would each state in the Union possess a right to control these operations?"

This inquiry the opinion answers in the negative.

From which it is clearly deducible that the power of the state to control the corporate functions of a national banking association is no greater than its power to control an officer of the Federal Government in the exercise of the official functions vested in him.

In *Farmers etc. Nat. Bank v. Dearing*, 91 U. S. 30, the question at issue was the power of the state to prescribe by law a penalty for excessive interest charges by a national bank. Mr. Justice Swayne, writing the opinion of the Court, said this respecting national banks and the right of the state to control their activities (p. 33):

“The national banks organized under the act are instruments designated to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge.

“Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is ‘an abuse, because it is the usurpation of power which a single state cannot give.’ Against the national will ‘the states have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government’ (*Bank of the United States v. McCulloch*, *supra*; *Weston and Others v. Charleston*, 2 Pet. 466; *Brown v. Maryland*, 12 Wheat. 419; *Dobbins v. Erie County*, *id.* 419).

“The power to create carries with it the power to preserve. The latter is a corollary from the former.

“The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the general government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes:

“Those which belong exclusively to the states.

“Those which belong exclusively to the National Government.

“Those which may be exercised concurrently and independently by both.

“And those which may be exercised by the states, but only with the consent, express or implied, of Congress.”

It is believed to be certain that the power, by means of high prerogative writs, to restrain these creatures of the National Government within the limits of the powers conferred upon them is one which, under this classification, belongs inherently and exclusively to that sovereign which gave them being, and alone

possesses power to grant, enlarge or restrict their corporate franchises.

In *Ableman v. Booth*, 21 How. 516, the division of sovereignty under our dual system of government was thus defined by Mr. Chief Justice Taney (p. 138):

“The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty, and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred **on them** by the United States, and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so, for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated

to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned."

Note.—This case dealt with the power of a state court to discharge a prisoner, held under process from a court of the United States, on the ground that the law under which he was held was invalid.

And in Tarble's case, 13 Wall. 405, where a state court discharged a deserter from the army on the ground that his enlistment was invalid, Mr. Justice Field, delivering the opinion of the Court, said on the same subject, after quoting the above extract from Ableman's case:

"It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several states, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of

each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or **authorize any interference therein by its judicial officers with the action of the other.** The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, **that they would if their authority embraced distinct territories.** That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments."

• • • • •

"Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective **laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.**"

And in *Tennessee v. Davis*, 100 U. S. 263, Mr. Justice Davis said for the Court:

“The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will or withhold from it, or a moment, the cognizance of any subject which that instrument has committed to it.”

The high prerogative character of the writ here under consideration, and the sovereignty to which it appertains, is in effect pointed out in *Territory v. Lockwood*, 3 Wall. 238. Lockwood, having been appointed to office in a territory by the President, the Attorney-General of the territory sued out a writ of quo warranto to oust him therefrom. It was held that, as the source of the office was the general government, only the general government could institute the proceeding. Said Mr. Justice Swayne, speaking for the Court in that case:

“The writ of quo warranto was a common-law writ. In the course of time it was superseded by the speedier remedy of an information in the

same nature. It was a writ of right for the king. In the English courts an information for an offense differs from an indictment, chiefly in the fact that it is presented by the law officer of the crown without the intervention of a grand jury. Whether filed by the Attorney-General or the Master of the Crown Office, and whether it relates to public offenses or to the class of private rights specified in the statute of 9 Ann. Ch. 20, in relation to which it may be invoked as a remedy, it is brought in the name of the king, and the practice is substantially the same in all cases. Any defect in the structure of the information may be taken advantage of by demurrer.

“In this country the proceeding is conducted in the name of the state or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect.

“In *Wallace v. Anderson*, this court said, ‘that a writ of quo warranto could not be maintained except at the instance of the government; as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question.’ In the case of the *Miners’ Bank v. United States*, on the relation of Grant, the information was filed in the name of the United States in the District Court of Iowa Territory. The sufficiency of the information in this respect does not appear to have been questioned. A state court cannot issue a writ of mandamus

to an officer of the United States. 'His conduct can only be controlled by the power that created him.' The validity of a patent for land issued by the United States 'is a question exclusively between the sovereignty making the grant and the grantee.'

"The Judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the territory have no agency in appointing them and no power to remove them. The territorial legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the territory to prosecute such an information as this would carry with it the power of a motion without the consent of the government from which the appointment was derived. This the territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the states as to the federal officers whose duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the government of the nation. We do not find that it has been delegated to the territory."

And in *McClung v. Silliman*, 6 Wheat. 303, the power of a state court to address a writ of mandamus

to a register of an United States land office was denied, Mr. Justice Johnson for the Court observing:

“It is not easy to conceive on what legal ground a state tribunal can in any instance exercise the power of issuing a mandamus to the register of a land office. * * * And no one will seriously contend, it is presumed, that it is among the reserved powers of the states, because not communicated by law to the courts of the United States.

“There is but one shadow of a ground on which such a power can be contended for, which is the general rights of legislation which the states possess over the soil within their respective territories. It is not now necessary to consider that power, as to the soil reserved to the United States, in the states respectively. The question in this case, as to the power of the state courts over the officers of the general government employed in disposing of that land, under the laws passed for that purpose. And here it is obvious that he is to be regarded either as an officer of that government or as its private agent. In the one capacity or the other his conduct can only be controlled by the power that created him; since whatever doubts have from time to time been suggested, as to the supremacy of the United States in its legislative, judicial or executive powers, no one has ever contested its supreme right to dispose of its own property in its own way.”

The state court rested its judgment in the case at bar, in large measure, upon the utterances of this Court in *McClellan v. Chipman*, 164 U. S. 356, and *Davis v. Bank*, 161 U. S. 275, declaring the power of the state to bind national banks by legislation, prescribing regulations for the community at large; as to which, in *McClellan's* case, 164 U. S. 356, Mr. Justice White observed:

“National banks ‘are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be used for debts, are all based on state law.’”

But it is one thing for a state, legislating for the community, to prescribe regulations binding upon national banks as members of the community; and another entirely for the state to seek to regulate or control corporate functions derived from the general government.

In *Easton v. Iowa*, 188 U. S. 220, state legislation in the latter field was held invalid. In that case Mr. Justice Shiras, speaking for the Court, said:

“We think that this view of the subject is not based on a correct conception of the federal

legislature creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. The principles enunciated in *McCulloch v. Maryland*, 4 Wheat. 316, 425, and in *Osborn v. United States Bank*, 9 Wheat. 738, though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks.

“In the latter case, it was said by Chief Justice Marshall:

“The bank is not considered as a private corporation, whose principal object is individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole

opinion of the Court, in *McCulloch v. Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the Government of the United States."'

"A similar view of the nature of banks organized under the national bank laws has been frequently expressed by this Court. Thus, in *Farmers' National Bank v. Dearing*, 91 U. S. 29, it was said:

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."

"Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislation, and the Supreme Court of Iowa was in error when it held that national banks are organized and their business prosecuted for private gain, and that there is no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking."

And after reviewing numerous state and federal decisions, the opinion in that case concludes (l. c. 238-239):

"Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to

the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."

In *First National Bank v. Union Trust Company*, 244 U. S. 427, congressional sanction was expressly held required for such a proceeding as here by state authorities. That case had many features similar to this, with the basic exception that **in that case there was congressional sanction for the proceeding; while, in this case there is no claim of such.** In that case, the Attorney-General of the state had brought such a proceeding as here in a state court to test the right of a national bank to exercise certain powers claimed

under an act of Congress. This Court justified the proceeding on the ground that Congress had authorized it by the terms of the particular Act of Congress there under consideration. The narrow ground upon which the case proceeded in this respect is indicated by this language of Mr. Chief Justice White, speaking for the majority:

“The question of the competency of the procedure and the right to administer the remedy sought, then remains. It involves a challenge of the right of the state Attorney-General to resort in a state court to proceedings in the nature of quo warranto to test the power of the corporation to exert the particular functions given by the Act of Congress because they were inherently federal in character, enjoyed by a federal corporation and susceptible only of being directly tested in a federal court. Support for the challenge in argument is rested upon *Albeman v. Booth*, 21 How. 506; *Tarble's case*, 13 Wall. 397; *Van Reed v. People's National Bank*, 198 U. S. 554, 557; *State ex rel. Wilcox v. Curtis*, 35 Connecticut, 374. But without inquiring into the merits of the doctrine upon which the proposition rests we think when the contention is tested by a consideration of the subject matter of this particular controversy it cannot be sustained. In other words, we are of opinion that as the particular functions in question by the express terms of the Act of Congress were given only ‘when not in contravention of state

or local law,' the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and **we place our conclusion on that ground."**

Not all the members of the court agreed to this interpretation of the Act of Congress there under consideration; and, for the minority, Mr. Justice Van Devanter said:

"The writ of quo warranto was a prerogative writ and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege or power claimed under the United States it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned (*Wallach v. Anderson*, 5 Wheat. 291; *Territory v. Lockwood*, 3 Wall. 236; *Newman v. Frizzell*, 238 U. S. 537). As is said in the *Lockwood* case, 'the right to institute such proceedings is inherently in the government of the nation.' This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose, and 'are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit' (*Davis v. Elmira Savings Bank*, 161 U. S.

275, 283; *Van Reed v. People's National Bank*, 198 U. S. 554-557). Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them (*McClung v. Silliman*, 6 Wheat. 598, 605). If it were otherwise the supremacy of the United States and of its Constitution and laws would be seriously imperiled (*Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Tennessee v. Davis*, 100 U. S. 257; *State ex rel. Wilcox v. Curtis*, 35 Conn. 374).

"Thus much, as I understand it, is conceded in this court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress."

The effect of that opinion is that the state may proceed in quo warranto against a national bank to define the limits of its charter and restrain it within the limits thereof as so defined, **when, and only when, Congress shall have so authorized.** There is no pretense of such authority in the case in hand.

This is in keeping with what was said in *Van Reed v. People's National Bank*, 198 U. S. 554, where was dealt with R. S. U. S., Sec. 5242, forbidding attachments and injunctions against national banks in advance of final judgment, the validity and binding force of which on the state courts was there affirmed.

Said Mr. Justice Day (R. 557), who delivered the views of the Court in that case:

“National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit.”

The case of *State ex rel. v. Curtis*, 35 Conn. 374, was referred to in both opinions here in *First National Bank v. Union Trust Company*, *supra*. The opinion in that case is a very satisfactory exposition of this question, and expressly denies the power of the state which is here asserted. It is there said:

“The power to create a corporation is an attribute of sovereignty; and the Government of the United States created the corporation in question, in the exercise of that independent and supreme sovereign power which the people delegated to it by the Constitution. It is, therefore, the creature of that sovereignty, and amenable to and controllable by it and by none other.

“An information in the nature of a quo warranto against a corporation lies only at the instance and in the name of the sovereign power which created it (5 Wheaton 291). The original

writ so lay against any person who usurps any franchise or liberty against the king, or for misuser or nonuser of franchises or privileges granted by him. The information in the nature of a quo warranto, authorized by the statute of the 9th of Anne, at the relation of any person against any other person usurping, intruding into or unlawfully holding any franchise or office in any corporation, is but an extension of simplification of the ancient writ and is grantable only where that would lie. In England it lies in the name of the sovereign against those who usurp such franchises, because such usurpation is in derogation of the rights of the crown. In this country it lies in the name of the government, against those who usurp such franchises, because **grantable or granted** by the commonwealth.

“‘The state or commonwealth,’ says Mr. Angell in his *Work on Corporation*, ‘stands in the place of the king and has succeeded to all the prerogatives and franchises proper to a republican government. With us, therefore, to assume a power which cannot be exercised without a grant from a sovereign authority, or to intrude into the office of a private corporation, contrary to the provisions of the statute which creates it, is, in a large sense, to invade the sovereign prerogative and to assume or violate a sovereign franchise.’ And the cases cited fully sustain his positions. Upon the same principles the information can lie only in the name of the United States, and in the federal courts, against those who invade a franchise **grantable or granted** by the national government.

“As then the corporation in question is the creature of federal sovereignty, and in respect to its internal organization, operation and continual existence, is amenable to and controlled by that sovereignty alone; and as the writ in question is properly grantable by that sovereignty alone whose franchise has been invaded and violated, it would seem upon principle too clear for argument (if there be nothing more in the case), that the relator has erred in invoking the interference of another uninvaded and unviolated sovereignty, and the court below have erred in assuming jurisdiction and granting the writ.

“Such is the obvious *prima facie* character of the case before us. But the plaintiff insists that there is no error, and makes several claims, founded upon the complex character of sovereignty as it exists in this country divided between the national and state governments.

“1. He insists in the first place that this institution is amenable to state sovereignty, because it is located and its officers discharge their duties and perform their functions within this state. This claim is groundless.

“It is, indeed, true, in the language of the Supreme Court of the United States (2 Howard 555), that ‘a corporation created by a state, to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, is a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled—for the purpose of

suing and being sued—to be deemed a citizen of that state.’ But this is not such a corporation. It was not created by us; it does not perform its functions under our authority; and it is the creature of and controllable by another and superior sovereignty. That other sovereignty is exercised over the whole country irrespective of state lines or state authority. It places its officers and agents and instruments wherever its necessities or its interests require, and necessarily within the limits of the states. With those officers, and agents, and instruments, in the exercise of their functions, state authority can in no way interfere. The national banks are its instruments, by which it performs its functions in establishing a national currency; on that fact their constitutionality is placed, and in the exercise of the powers conferred upon them, they are as independent of state control as the army, or navy, or the officers of the subtreasury and custom house, or any other instrumentality by which the functions of the federal government are performed. No other view is compatible with the principles of our own jurisprudence, or those recognized and declared by the Supreme Court of the United States in numerous cases, and particularly in the exhaustive opinion of Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheaton 316.

“2. The relator insists, in the second place, that the Superior Court has jurisdiction of the offense set forth in the information, because the judicial power of the federal and state governments is exercised concurrently by the courts of

either, unless Congress has conferred exclusive jurisdiction, in respect to the subject matter, on the federal courts, and no such exclusive jurisdiction has been conferred in relation to this. This claim is equally unfounded.

“It is undoubtedly true that the state courts retain jurisdiction over some matters, to which, by the Constitution and laws of the United States, jurisdiction is given to the federal government and courts, and in respect to which jurisdiction appertained to and was exercised by the state courts prior to the adoption of that Constitution. On that subject the rule seems to be that the state courts retain the jurisdiction which they had before that event, except where it was taken away by an exclusive constitutional grant of jurisdiction to the federal government; or Congress had made the jurisdiction exclusive in the federal courts; or the exercise of the jurisdiction is repugnant to, and incompatible with, such exercise by those courts.

“But the cases where such concurrent jurisdiction can be entertained by the courts of the state are few. Most of those where such jurisdiction has been sustained by the Supreme Court of the United States, and all to which we have been particularly referred, were cases of a criminal character, where the act was an offense against both sovereignties and punished by a law of the state. Here there could be no jurisdiction anterior to the adoption of the Constitution. Nor has there been any invasion of the sovereignty of this state or violation of its laws, or any offense which the state is called upon to redress in its

own behalf. It is a clear principle that where there has been no offense there can be no judicial jurisdiction, and equally clear that **a state has no authority to enforce a national law in behalf of the national government.**

“And this is one of the class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the national government. The corporation in question, being the creature and instrument of that government, must necessarily be subject to that alone. By the common law, and by our statute, an information of this character lies as well to deprive a corporation of its charter as to determine the rights of its competing officers; and if the relator is right in this claim, its charter can be taken away and its franchises seized by the courts of the state. Nothing could be more repugnant in character than such an unauthorized interference, for such a purpose or for any purpose.

“3. The plaintiff claims in the third place that concurrent jurisdiction of the subject matter is conferred upon the state court by the Amended Currency Act of 1864, Section 57, which provides that suits, actions and proceedings against any association, under this act, may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. Provided, however, that

all proceedings to enjoin the comptroller under this act shall be had in a circuit, district or territorial court of the United States, held in the district in which the association is located.' To this claim also we find it impossible to assent.

"The information in the nature of a quo warranto, although grantable to determine a private right to an office in a corporation, between party and party, as well as to determine the right of the corporation to the franchise assumed, and a civil proceeding, must be filed and issued in the name of the sovereignty which created the corporation and is still so far forth a prerogative writ."

Kindred thereto is the opinion of the Supreme Court of South Carolina in a proceeding by the Attorney-General of that state to remove a presidential elector from office, of which the Court said (State ex rel. v. Bowen, 8. S. C. 400):

"The real point of difficulty in the present case was not noticed by counsel for defendants. It arises out of the general rule governing the right of quo warranto, and therefore applicable to formal proceedings serving as a substitute for that remedy. The present action is brought in the name of the State of South Carolina. Can it be maintained in the name of the state? And if not, does not that circumstance prevent judgment? If so, a further question would arise whether that defect can become available to the

defendants under their plea to the jurisdiction, notwithstanding the objection was not taken by them in form.

“The familiar rule governing proceedings by quo warranto is that only the sovereign from whom the office, franchise or liberty—that is, the subject of controversy—originated, and into whose hands the same, if forfeited, would return, can maintain the remedy or authorize it by the allowance of his name as a means of asserting the title of right of a citizen to the same.

“It is necessary, then, to inquire whether the United States or the state stands in the relation just expressed to the rights in controversy in the present case.

“The question then arises, did the authority claimed to be exercised by the defendants as electors of president and vice-president originate in the constitution and laws of the United States or in those of the state? * * *

“In the present case the United States has created the function, but authorized the state to exercise the power of appointment to fill it.

“The case of a municipal corporation created by the sovereign, who has conferred upon the corporation the power of choosing municipal officers, involves the same general relationship. In the latter case the ouster must take place in the name of the sovereign.

“The act of appointment is one that can be exercised in the hands of a subject, while the act of ouster, through the courts of law, can only be claimed of common right through the sov-

ereign. The existence, therefore, of the former right cannot imply the existence of the latter, for its nature and quality are different.

"In *Wallace v. Anderson* (1 Wheat. 291) it was held that a writ of quo warranto could not be maintained against an officer of the United States except in the name of the Government of the United States. The same was held in *Territory v. Lockwood*, 3 Wall. 236.

"It is very clear that if the action in the nature of quo warranto is an appropriate remedy under the claims made in behalf of the individuals who united with the state as plaintiffs, such proceedings should be presented in the name of the United States. It will not be necessary to determine whether an action in the nature of quo warranto can be maintained in the state courts in the name of the United States."

In *Harkness v. Guthrie*, 27 Utah 248 (75 Pacific 625), was involved the common-law right of a shareholder to inspect the books of a national bank. In distinguishing this right of the shareholder from the sovereign right of visitation, the Utah Court observed:

"In the United States visitorial power over all except private eleemosynary corporations existing under and by virtue of the laws of a state vests in the state, and, as to those formed under an act of Congress, it vests in the general government, and is exercised through the medium of

the courts, or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated in *Merrill on Mandamus*, Sec. 175, that 'visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings.' "

That case came here, and the views of the Utah Court were approved (*Guthrie v. Harkness*, 199 U. S. 156). It was held that the common-law right of the shareholder to examine the books of the corporation was one thing; the power of visitation of the sovereign another.

Mr. Justice Day, speaking for the Court, said (199 U. S., l. c. 157-158):

"We are unable to find any definition of 'visitorial powers' which can be held to include the common-law right of the shareholder to inspect the books of the corporation. 'Visitation' is defined by Bouvier (*Die.*, Vol. II, p. 1199) as follows:

" 'The act of examining into the affairs of a corporation.

" 'The power of visitation is applicable only to the ecclesiastical and eleemosynary corporations (1 Black. Com. 480). The visitation of civil corporations is by the government itself, through the medium of the courts of justice. (See 2 Kent 240.) **In the United States, the leg-**

islature is the visitor of all corporations founded by it for public purposes (4 Wheat. 518).'

"The origin and nature of 'visitorial' power received full discussion in the case cited by Bouvier from 4 Wheaton. (See opinion of Mr. Justice Story in **Dartmouth College case**, 4 Wheat. 673.)

"The meaning of this section was before Judge Baxter in the case of **First Nat. Bank of Youngstown v. Hughes**, 6 Fed. Rep. 737, and of the meaning of the term 'visitorial powers,' as used in section 5241, that learned judge said:

"'Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforces an observance of its laws and regulations. Burrill defines the word to mean "inspection; superintendence; direction; regulation."'

"At common law the right of visitation was exercised by the king as to civil corporations and as to eleemosynary ones by the founder or donor (1 Cooley's Blackstone 481). '**In the United States the legislature is the visitor of all corporations created by it**, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause forfeiture of their charters' (1 Cooley's Blackstone 482, note)."

The other side of the shield is presented by the opinion of the Supreme Court of Ohio in *State ex rel. v. Cincinnati etc. Railway Co.*, 7 Lawyers' Reports

Annotated 319. This was a proceeding in quo warranto against certain railroad companies chartered by the state, for a violation of their charters, by reason of discriminations in interstate commerce. Because of the paramount right of Congress to regulate interstate commerce, the respondents challenged the right of the state to so proceed. ' 1

The Ohio Court denied the contention, saying:

"As the state was not bound to create it in the first place, it is not bound to maintain it, after having done so, if it violates the laws or public policy of the state or misuses its franchises to oppress the citizens thereof.

"For such offenses the state, acting through its legislature and courts, and in the exercise of a sound discretion, may either destroy the corporation entirely, by forfeiting its charter, or oust it from the wrongful exercise of its powers; and if, instead of, or in addition to, misusing the franchises actually conferred, it usurps others, the circumstance that the usurped franchises relate to and concern commerce between the states ought not to deprive the state of its visitorial power. If the state creating the corporation is deprived of its power, none exist elsewhere. 'The government creating the corporation can alone institute such a proceeding (quo warranto to adjudge forfeiture of a corporate franchise), since it may waive a broken condition of a compact made with it' (Angel & A. Corp., Sec. 777, and cases cited. See note 6)."

The opinion of the state court is obscure with respect to the state statutes mentioned in the opinion (R. S. Mo. 1919, Secs. 11684 and 11737). We do not think the Court intended to be understood as holding that these statutes forbid a national banking association doing business in the state to have more than the one office, or place of business. The statutes are part of a system regulating state banks, and, as such, are presumably valid. But in the discussion of the powers of national banking associations or the right of the state to maintain this proceeding, these statutes have no place. The very question dealt with in *Osborne v. Bank of United States* was whether the state of Ohio might forbid a national bank to have offices in the state without a purchase of the privilege. The inquiry was answered in the negative. Upon the same considerations it must be held beyond the power of the State of Missouri to enlarge, restrict or deny the powers of national banking associations, by statute, for the reason that such powers are drawn from another source.

It was argued at the bar of the state court that if the contention of the plaintiff in error should be allowed, national banking associations might engage in the operation of mercantile or manufacturing establishments, within the boundaries of the state, with no right on the part of the state to interfere.

That is at it may be. The question is not here. The plaintiff in error was chartered by the National Government as a bank; it is engaged only in banking, and proposes to engage only in banking. In other words, it is exercising only the corporate functions conferred upon it by the National Government. In its ultimate analysis, the complaint of the State is merely as to **the extent of the exercise of powers expressly conferred by the United States**. Surely the sovereign which confers the power is the proper authority to control its exercise. As well may it be said that the State might complain, if the postmaster at St. Louis established a branch post office at a place where the State thought there should be none; or if the Collector of Internal Revenue for the district did likewise for the better accommodation of taxpayers.

As said by the Connecticut Court in the case referred to above, a proceeding to inquire into the exercise of powers "**granted or grantable**" by the National Government can be instituted only by that government.

And this in turn is in perfect keeping with the fundamental nature of such a proceeding as one to **return** unto the sovereign a franchise which he has not granted, or which, being granted, has been forfeited.

How can a franchise which can only emanate from the National Government be, by the judgment of whatsoever court, adjudged returned to the State of Missouri?

That the United States might, or may, maintain such a proceeding as here to define the powers of the plaintiff in error, and restrain it within the powers thus defined, goes without saying. (Indeed, at the argument of this case at the bar of the state court it was said by counsel that unsuccessful efforts had been made to procure the Department of Justice to bring **this proceeding**, before the Attorney-General of the state was asked to so proceed.)

That such a proceeding is the exercise of a supreme sovereign power is equally plain. It is not possible for both the state and the general government each to be supreme in the same field. Sovereignty cannot be concurrent, else it is not sovereignty.

Are there those who would contend that the general government might attempt to restrain, within the supposed limits of the legislative grant, corporations created by the state? And if not, what considerations make for the denial of the power in the one case which do not equally apply in the other?

Under our form of government it is fundamentally impossible that supreme sovereign power as to the same subject matter may rest both in the National

Government and that of the state. In the infancy of the republic it was the anxious duty, but high prerogative of this Court to declare these fundamentals with respect to the relations of the national and state governments on the due respect for which the perpetuity of our institutions must depend.

The present necessity of again enforcing them may be of service in this hour of social unrest.

The argument advanced by the state court on the question is specious, but not sound. It is that Congress has not conferred the asserted power upon the bank; its exercise is contrary to the laws of the state, hence the state may interfere to prevent its exercise. In its ultimate analysis this position is equivalent to the assertion that where, upon judicial authority, it is found that the asserted power has been granted a national bank, only the National Government can conduct the inquiry. But where it has not been granted, the state may intervene. Under this reasoning, the prosecution of illfounded proceedings of this type is the exclusive function of the National Government; those which are well taken are among the functions pertaining to the state.

Suppose the general government should, hereafter, institute a similar proceeding to this against the plaintiff in error. Upon what consideration would its undoubted interests in the subject matter be fore-

closed by any judgment which may be herein pronounced? And if the judgment is not to foreclose the question, why pronounce it?

It seems unnecessary to give particular consideration to the abstract question of jurisdiction of the state court. As said by the Supreme Court of South Carolina in *State ex rel. v. Bowen*, *supra*, the right of the **National Government** to institute such a proceeding in a court of the state need not be inquired into. The inquiry goes deeper; it concerns the power of the state to exercise sovereign powers pertaining to the Government of the United States. The state court mentioned in this connection R. S. U. S., Sections 5186 and 5198, Act of July 12, 1822, as re-enacted (U. S. Comp. St. 1916, Sec. 9668). These statutes do no more than confer jurisdiction on the proper state courts of ordinary actions between ordinary litigants, to which national banking associations are parties. But they are devoid of any expression of an intention on the part of Congress to surrender the sovereignty of the United States over its own corporations. Particularly is this true in view of the particular provisions of Subdivision 16 of Section 24 of the Judicial Code, specifically providing for jurisdiction in the national courts of such an action as this by the National Government.

But the question seems one of academic interest only. If the state possesses the sovereign power over

national banks, which is here asserted, it certainly has power to designate the court by means of which it will exercise the authority. And, on the other hand, if the state has no sovereignty in the premises, because the same pertains exclusively to the National Government, that is an end of the inquiry in whatsoever court the proceeding may have been undertaken.

It is respectfully, but earnestly insisted that the state is without prerogative here, her Attorney-General without right or duty, and that the state court was in error in ruling otherwise.

II.

Perhaps the kernel of the case as concerns the right of the bank to do what it has undertaken can be best presented by indicating, first, what the information **does not** charge, and then contrasting this with what it **does** charge.

What the Information Does Not Charge.

The information **does not** charge, except as a legal conclusion, that the respondent has established, or intends to establish, branch banks, and it is quite irregular to assume that this proceeding, in substance or effect, involves any feature of **that** question.

(1) Branch banks may be, and usually are, located in a foreign jurisdiction (i. e., some other state) or in some separate political subdivision of the same state—nothing of the kind is charged here.

(2) The creation of branch banks, doubtless, involves some segregation and apportionment of the capital stock of the parent institution, put at hazard in the operation of the subsidiary—and nothing of the sort is charged here.

(3) The operation of a branch bank necessarily involves the direction and control of the subsidiary institution by independent and local directors and the actual operation of the branch by independent and local officials—and nothing of this nature is charged here.

What the Information Does Charge.

What the information **does charge** is:

(1) That the respondent, being empowered by the national law so to do, had for a long time engaged in the banking business in the City of St. Louis, Missouri, and for several years it had conducted, and is now conducting, its business at a banking house located at Broadway and Locust street in said city (Rec., p. 1);

(2) That lately the respondent had opened another banking house or office (except by the State's Attorney-General a "branch bank") at 818 Olive street

in **said city**, where it also conducted its banking business, whereby it was usurping power **denied to** and withheld from it by both **state and federal** laws (Rec., p. 2);

(3) That respondent purposes to open other banking houses or offices (again yeleft "branch banks") at various other points **in said city** (Rec., p. 2).

After other allegations, either legal conclusions (or immaterial in this presentation) a writ of quo warranto is prayed for (Rec., p. 3).

Questions Not Involved Here.

The question whether a national bank, having charter power to do business in a particular city or other political subdivision, may open a banking house, office or branch bank in another state or in another city or political subdivision of the same state does not arise on this record and may safely be left to be determined in some case where it does arise.

Question Involved Here.

The sole question presented by this record, as relates to the merits, is this:

Is a national bank, having charter power to do a banking business in a designated **city, limited and restricted** to conducting that business at **one** banking house or office in such city?

Express or Implied Power of National Banks.

The right of the bank to have more than one banking house or office within the city where, by its charter, it is authorized to do business, arises either out of the **express** or the necessarily **implied** powers found granted to such bank—and which is immaterial.

The National Banking Act, after providing that banks may be formed by five or more persons entering into **articles of association**, which shall specify, in general terms, the object of its formation (R. S., Sec. 5133), then provides that the organization certificate shall specifically state, first, the name of the bank, and

“Second. The place where its operations of **discount and deposit** are to be carried on, designating the **state**, territory or district, and the particular county, **city**, town or village” (R. S., Sec. 5136).

This being done, the act then provides that the bank **shall have power** to regulate, by by-laws, “**how its general business** (shall be) conducted and the privileges granted it by law exercised and enjoyed,” and “to exercise * * * all such **incidental powers** as shall be **necessary** to carry on the **business of banking**,” etc.

Respondent complied with these requirements designating the **City of St. Louis** as “the **place** where its

operations of discount and deposit were to be carried on" (Rec., p. 1).

The word "place" as used in R. S., Sec. 5190, quoted above, does not mean the **location** within the "county, city, town or village," but means the county, city, town or village **within which** the operations of the bank are to be carried on.

This is not only the **necessary effect of the language** used, but is also the **judicial construction** unwaveringly given to that language.

This Court had occasion to consider the meaning of the words "the place" as used in Section 5190 of the National Banking Act, in the case of McCormick v. Market National Bank, 165 U. S. 538, l. c. 549, where it said:

"The provision of section 5190 that 'the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate' refers to its 'usual business' after obtaining its certificate from the comptroller; and to '**the place,**' that is, the **city or town, in which,** after it has been authorized by the comptroller's certificate to commence its business of banking, **its office or banking** house is located.'" (Bold-face type ours.)

Like construction was given to these words by the Supreme Court of Illinois (McCormick v. Market Na-

tional Bank, 162 Ill. 100, l. c. 108), where that Court said:

“The association is required, in its organization, to state **the place** where its operations of discount and deposit are to be carried on, but by this is meant the **town or city, not the room, street or number** in such town or city.”

Nothing more appearing, it would clearly be within the respondent's express or incidental or implied powers (and it will be noticed that these, too, are **expressly** granted by the seventh subdivision of R. S. 5136), and the respondent would be clearly entitled to exercise its charter powers at such locations, and at as many locations as it saw fit to exercise them, within the territorial limits of the **place** where it was granted the power to do its business. For certainly the grant of an **unrestricted** power to do business within a designated area is not and cannot be a grant of **restricted** power to do business in that area.

Moreover, treated as a mere incidental or implied power, it is quite certain that a bank has quite as full measure of implied powers, restricted to the objects for which it is formed, as has any other corporation, restricted to the objects for which it is formed.

Implied powers include not merely what is **strictly necessary**, but whatever, not being expressly prohib-

ited, may "fairly be regarded as **incidental** to the objects for which the corporation is created."

Green Bay v. Steamboat Co., 107 U. S. 98, 100.

An implied power is one that is "**needful, suitable and proper** to accomplish the **object of the grant**, and one that is directly and immediately **appropriate to the execution of the specific powers**" granted.

People v. Pullman P. C. Co., 175 Ill. 125, 136.

A power which is obviously **appropriate and convenient** to carry into effect the franchise granted has always been deemed a **necessary** one."

State v. Hancock, 35 N. J. L. R. 537, 545.

Tested by these rules, it needs no argument to show that in a large city several officers or banking houses are, or may be, "needful," "proper," "appropriate," "convenient" and even strictly "necessary" and essential to the full exercise of the powers expressly granted.

The legislative purpose in authorizing the creation of national banks, as it relates to the general public, is to afford, through national banks, banking facilities to the community of the place where the bank is authorized to operate.

The legislative purpose, as relates to the bank, is to permit it to serve, and thereby secure custom and profit, from as many of the community within the designated area as see fit to become its patrons.

Both of these purposes (i. e., as relates to the public and as relates to the bank) are best accomplished if the facilities for dealing between the bank and the public are increased, and not restricted. Plainly, additional banking houses or offices located in the several business centers, usual in all large cities, mean, necessarily, increased opportunity to the business interests located in these several business centers to do their banking business at such additional banking houses or offices; and thereby the public purposes in the legislative mind is better accomplished; and, in turn, as this means increased custom for the bank, it necessarily follows that the **private** purpose in the legislative mind (as relates to the bank itself) is also better accomplished.

In *Gas and Fuel Co. v. Dairy Co.*, 60 Ohio State Reports 96, 104, the Court said:

“These implied powers which a corporation has in order to carry into effect its legitimate purposes are not limited to such as are indispensable to their accomplishment, but comprise all those powers that are necessary in the sense of appropriate, convenient and suitable, including a right of reasonable choice of means to be

employed; and whether an act comes within those powers, must be determined in each case from all its facts and circumstances.”

In *Union Bank v. Jacobs*, 25 *Humph. (Tenn.)* 515, 525, it was said:

“A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to **any means** that would be necessary and proper **for an individual** in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing.”

In *Barry v. Merchants' Exchange Company*, 1 *Sandf. Ch. (N. Y.)* 280, 289, it was said:

“But corporations are usually created for some limited and specific purpose, and therefore the general powers incident to a body corporate at common law are restricted by the nature and object of the institution of each. And every such corporation has power to make all contracts which are necessary and **usual** in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law, or the provisions of its charter.

“Upon this principle, and to the extent stated, a corporation in order to attain its legitimate objects, **may deal precisely as an individual may** who seeks to accomplish the same end.”

In *Willmarth v. Crawford*, 10 Wend. (N. Y.) 341, 342, it was said:

“Corporations, while acting within the scope of their authority under the act creating them, that is, in the execution of the powers granted to or duties imposed upon them by the charter, are to **this extent and end like natural persons**; and this view may frequently determine the lawfulness or unlawfulness of their acts, and the remedies which exist for and against them. Indeed, the whole effect of a charter oftentimes is only to invest the individuals composing the corporation in the aggregate with powers in reference to a specified object, which each member in his natural capacity already possesses; the charter in question is an instance of the kind. There are many others where privileges are granted not belonging to individuals. **The tendency of modern decisions has been to assimilate the actions of corporate bodies**, within their sphere, to those of **natural persons**, and to determine their rights and their liabilities, and apply remedies for and against them, upon principles applicable to the latter.”

And in *Wright et al. v. Hughes et al.*, 119 Ind. Rep. 324, 328, the Court said:

“Accordingly it may be regarded as settled that where general authority is given a corporation to **engage in business**, and there are no spe-

cial restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories."

See, also, *Legrand v. The Manhattan Mercantile Association*, 80 N. Y. Rep. 638; *Brown v. Winnisimmet Company*, 11 Allen Reports 326; *Nebraska v. First National Bank*, 88 Fed. Rep. 947; *First National Bank v. Ocean National Bank*, 60 N. Y. Rep. 278; *First National Bank v. Harris*, 108 Mass. 514; *Straus and Brother v. Eagle Insurance Company*, 5 Ohio State Report 59; *Hood v. New York & New Haven Railroad Co.*, 22 Conn. Rep. 1, 16; *The Banks v. Poitiaux*, 3 Rand (Va.) 136.

That corporations generally (disregarding, for the nonce, any reference, express or implied, to banking institutions) usually (and one may almost say naturally) exercise their granted powers at several, and frequently numerous, locations needs no argument. One has but to open his eyes and see, or close his eyes and think of, the very numerous branch offices through which corporate powers are exercised by nearly every business activity in which corporations are permitted to engage.

If this is one of the "needful," "convenient" or "appropriate" means, and, therefore, one of the implied or incidental powers by which an ordinary corporation may exercise its express powers, it is diffi-

cult to conceive of any **reason** why a banking institution should not have like incidental and implied powers.

The gist of all the law on the subject of implied powers is this: If the manner or method availed of is, or may be, **helpful** in accomplishing the express power granted, then the corporation may resort to this manner or method, unless there is express inhibition. No such inhibition is claimed or found here.

The **demonstration** that the power to create additional banking houses or offices within the city where it is authorized to do business will be, or may be, **helpful** to a national bank lies in the fact that like additional banking houses or offices **have proven helpful** both to state and national banks.

It is a matter of general knowledge, of which courts take judicial notice, that branch offices or banking houses do exist in most if not all of the larger cities.

Some of these exist, perhaps, under express statutory grant of the power, some under the implied power; some are state banks—some are national banks.

Here, in the City of Washington, there are three banking rooms, branch offices of the Riggs National Bank, in three different localities. The Chatham & Phoenix National Bank has nine such offices, the Me-

chanics & Metals 12, the Chase National, the Public National 5, in New York City. The Calcasieu National Bank at Lake Charles, Louisiana, has 8.

According to the records of the comptroller's office national banks operating such offices exist in fifteen different states.

What is so universally availed of must necessarily have proven **helpful**, and if helpful in the execution of **express powers** is within the **implied powers**, unless prohibited.

Has Congress Inhibited the Establishment of Additional Banking Houses or Offices?

Although the right to do what is here sought to be suppressed (i. e., the right to establish additional banking houses or offices within the area designated by the charter) is within the implied and incidental powers of the bank, it is, of course, conceded that Congress **might have inhibited the exercise of this power.**

This brings us to the question:

Has Congress enacted any inhibition?

The Attorney-General of the State of Missouri says it has.

The respondent says it has not.

This inhibition, it is asserted, is found in R. S. Sec. 5190.

That section reads:

“The usual business of each national bank **shall** be transacted at **an office** or banking house located in the **place** specified in its organization certificate.”

Having in mind that the words “the place” mean the territorial area **within which** the bank is authorized to do its business, and not a designated lot or building located in such area, the question that arises for construction under Section 5134 is this:

Is that section a **limitation** or a **command**?

Does that section place a **limitation** upon the **manner or method** or the **number of offices** in which the granted charter powers shall be exercised, or does it **command** that they shall be exercised in a place of business, i. e., “an office of banking house,” as contradistinguished from the “curb” or somebody’s kitchen?

(a) It is to be noted, in the first place, that R. S. Section 5190 is a part of that subdivision of the federal statutes which has to do with the “regulation” of national banks.

Ordinarily, regulatory statutes are not intended to **delimit** the powers granted by existing statutes vesting organic powers.

By the existing statutes (R. S. 5133, et seq.) a national bank is given the right to do a **banking**

business **within** the designated city, town or village. The exercise of this charter power is not by these sections limited to **one or any number** of locations within such city, town or village.

(b) The natural reading, and the manifest purpose of R. S., Sec. 5190, is that the bank shall have "an office or banking house" located in the "place," i. e., "**business place**" in city, town or village, designated in its organization certificate—not that it shall have "but an office" or "only one office." These would have been the chosen words if **limitation** had been the legislative purpose. And there being **no limitation**, the bank may have as many offices as it deems **needful**.

The statute **commands** that the bank shall maintain **an** office or banking house, and **permits**, because it does not restrict the establishment of **as many as the bank sees fit to have**.

The purpose of the **command** is that there shall be **at least** one place of business where those who want to transact business with it may do so—where the State's Attorney-General, as he saw fit to do in this case, may serve it with process—where the Attorney-General of the United States, if he saw fit, as he did not see fit in this case, may do likewise—where any one who has any business with the bank may seek it out and transact that business—that it shall exercise the granted powers at a **place of business** (office

or banking house), and not under somebody's hat or hoopskirt.

The statute is little more than the familiar statute, common to most, if not all the states, concerning both foreign and domestic corporations that they shall, in the place where it is organized, in the case of domestic corporations, or where its principal place of business is located in the foreign state, maintain an office where process may be served upon it.

It is a **command** that it **shall have** at least an office, but not an **inhibition** against its having **more than one** or **as many as it likes**.

Whoever heard of any corporation on earth being restricted, by statute, to doing business at one location in a restricted territorial area?

What would be the **purpose** of any such provision?

Who, before this proceeding began, ever suggested that any **useful purpose** would be subserved by any such inhibition?

What, but **apprehension of competitors** would suggest it now?

But, if **suggested**, would any Legislature, much less the National Legislature, signify its approval of the suggestion by a weak-kneed enactment **labeled** "regulation," which does not purport to **inhibit**, which does not use the word "inhibition" or "prohibition" or any equivalent term anywhere.

The Congress of the United States is no “speak easy” institution.

It is not accustomed to express itself on bended knee with bated breath. Rather, it speaks trumpet-tongued—that all who are not blind, deaf and daft may hear and know.

To say that Congress, by this section, intended to **inhibit anything** is to confess utter unfamiliarity with the manner in which Congress speaks.

It is to **torture** the statute to a meaning which the Congress never intended it should have.

(c) The Attorney-General for Missouri will, however, contend that R. S. Section 5190 was intended to and does limit a national bank to **one** office or banking house at which it may exercise its charter powers, notwithstanding the provisions of R. S. Sec. 5133, et seq., which provide that the bank may exercise its charter powers within—that is to say, **throughout**—the designated city, town or village.

The only way in which R. S. 5190 can be tortured into a **limitation**, and not of **regulation**, of the charter powers granted by the previous sections is to construe the article “an” (the equivalent of the article “a”) **as a word of limitation**.

But this would be entirely contrary to all previously decided law on this subject.

The indefinite article "a" or "an" is not usually a word of limitation.

"As by its derivation, so also in meaning, **an** or **a** is a weaker or less distinct **one**.

"Usually, as the indefinite article proper, it points out, in a loose way, as **one** of a **class** containing **more** of the **same kind**" (Century Dictionary).

The Constitution of Arkansas provides that for each circuit "**a** judge shall be elected."

The Arkansas Legislature passed an act providing for "**an** additional judge" for the Sixth Circuit.

The Attorney-General of Arkansas filed quo warranto, alleging that the act was unconstitutional, and contended that the letter "**a**" before the word "**judge**" in the Constitution was "**a** limitation upon the power of the Legislature to provide for more than one judge in a judicial circuit."

The Court, in refusing the writ, said (State ex. rel. v. Martin, 60 Ark. 343, 28 L. R. A. 153):

"Now, the adjective '**a**,' commonly called the 'indefinite article,' and so called, too, because it **does not define any particular person or thing**, is entirely too indefinite, in the connection used, to define **or limit the number** of judges which the legislative wisdom may provide for the judicial circuits of the state. And it is perfectly obvious that its office and meaning were well understood

by the framers of our constitution, for nowhere in that instrument do we find it used as a **numerical limitation**. * * * According to Mr. Webster 'a' means 'one' or 'any,' but less 'emphatically than either.' It may mean one where only one is intended. That is the trouble. **Of itself it is in no sense a word of limitation.** * * * The Constitution requires 'a judge' for each circuit, and there must be **AT LEAST ONE JUDGE.** **But where is the limitation** upon the legislature to provide for more if the necessity arises. * * *

This Court has said:

"The general rule is that 'words importing the singular number may extend to and be applied to **several** persons or things; words importing the plural number may include the singular' as provided in U. S. Rev. Stats., Sec. 1."

U. S. v. Oregon & C. R. Co., 164 U. S. 526.

The Supreme Court of Massachusetts says:

"The article 'a' is not necessarily a singular term. It is often used in the sense of 'any' and is then applied to more than one individual object."

National Union Bank v. Copeland, 171 Mass
257, 4 N. E. 794.

See

Thompson v. Association, 8 Common Bench Reports, 848;

European Cent. R. Co. v. Westall, 6 Best & Smith 970.

If the article "an" in R. S., Section 5190, is not a **word of limitation**, and all the authorities say it is not, then a national bank is not **inhibited** from establishing as many locations as it chooses for doing business in the designated territory, for there is no other statute under which it is claimed there is any restriction on its powers.

Departmental Construction.

It will be urged that the construction given by the "Department" should control this Court's opinion on the question presented.

The doctrine of "departmental construction," always dangerous, is never applied except where the claimed construction is of long standing, is uniform, and has become a "settled practice."

Merritt v. Cameron, 137 U. S., l. c. 551;

U. S. v. Healey, 160 U. S. 136;

U. S. v. Philbrick, 120 U. S. 52.

In *Merritt v. Cameron*, 137 U. S., l. c. 551, 552, Mr. Justice Lamar said:

"A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the treasury department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision."

In *Chicago etc. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97, l. c. 100, in construing a section of the Cummins Amendment to the Interstate Commerce Act contrary to an alleged contemporaneous construction by the Department and Congress, Mr. Justice Holmes said:

"It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy

of the later Act of August 9, 1916, c. 301, 39 Stat. 441, can prevail against what we understand to be the meaning of the words."

In cases where this rule was applied, the departmental construction was of long standing and acts had been done or rights had accrued under such construction, so that it would have been unjust or demoralizing to overturn the construction considered by the public as correct and settled.

U. S. v. Alabama Great Southern Ry. Co., 142 U. S. 615;

U. S. v. Finnell, 185 U. S. 236;

Swift Co. v. U. S., 105 U. S. 691.

In *Studebaker v. Perry*, 184 U. S., l. c. 268-269, Mr. Justice Shiras said:

"It is finally argued on behalf of the plaintiff in error that the doctrine of contemporaneous and practical construction put upon a statute by executive officers is applicable. It is said that former Comptrollers of the Currency held, in several instances, that the power to assess under the national banking law was exhausted by a single exercise; that subsequent comptrollers ought not to have departed from that construction, and it is urged that this court should, by its decision in this case, set aside the construction at present prevailing and restore the former one.

"The doctrine invoked is a useful one, but its

application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance."

In this case what department has ever, as its settled practice, denied the national banks the privilege of establishing branch offices or banking houses within the territorial area designated in the charters?

In 1910 application to establish such an office was made by the Lowry National Bank of Atlanta, Georgia.

There was apparently no "**settled practice**" of the Treasury Department at that time, for the question was, on January 3, 1911, referred by the Secretary of the Treasury to the Attorney-General for an **opinion**.

An opinion was written by the then special assistant to the Attorney-General, Mr. Wrisley Brown, sustaining the right to establish such branch offices.

Quite the contrary opinion was written by the then Assistant Attorney-General, Honorable J. A. Fowler, some time later approved by the then Attorney-General (29 Op. Atty. Gen'l 81).

So that this so-called "departmental construction"—which is construction by a course of acts, which acts indicate **administrative interpretation** long acquiesced in—is not departmental construction at all.

It shows nothing more and nothing less than a doubtful legal question concerning which the Treasury Department refused to determine or foreclose by its acts or otherwise, and concerning which it sought the advice and opinion of the government's Legal Department, the officials of which, in turn, found the question one concerning which they could not agree, and two divergent opinions are on file, to one of which, that adverse to our contention, it is true, is formally given by the head of the Legal Department.

But even so, the Attorney-General's opinion in no sense forecloses the reinvestigation by this Court. His opinion, and any action taken by the department pursuant to it, does not amount to "departmental construction" to which this Court should give any heed.

Moreover, the entire departmental action is based on one isolated instance in which the right now in question was claimed. The only occasion, so far as anyone knows, when the Treasury Department was ever called to act or opine was in the case of the application of the Lowry National Bank, referred to in the opinion of the Attorney-General's office.

There is here no basis for a claim of "uniform construction." There can be no uniform construction as to a matter which has only been construed **once**.

Again, in the very opinion rendered by Mr. Fowler and approved by the Attorney-General, it is expressly

stated "so far as the courts are concerned, the precise meaning of this section is an open one" (29 Op. Att'y Gen'l 94).

Finally, the so-called "departmental construction" contended for is neither persuasive nor to be relied upon in this case because the alleged opinions were not in furtherance of any legal duty. They amounted to no more than private opinions on academic subjects. If a national bank has a right to have branch offices, it has that right by virtue of its charter, irrespective of any superintending control vested in the comptroller of the currency. It has been held that where a departmental officer has no legal authority or jurisdiction to place a construction upon the statute, his action in construing said statute is without force.

State v. Mutual Life Ins. Co., 175 Ind. 59, 93 N. E., 1. c. 221;

Schuyler v. Southern Pacific Co., 109 Pac. (Utah) 458.

Furthermore, the authorities, including the Supreme Court of the United States, recognize the foregoing limitation, for in stating the general rule it is said that the construction placed upon a statute by departmental officers "**in the execution or administration**" of such statute will be considered by the courts in construing it.

Legislative Construction.

It will be claimed that because the Congress has, by three enactments, provided for **branch banks** in special and particular instances, or under special and particular conditions, this constitutes such **legislative construction** in denial of the right to have additional offices under the general statutes which is to control the judgment of the Court.

One instance of such special enabling statute is found in Section 7 of the Act of March 3, 1865, ch. 78 (13 Stat. 484, Sec. 5155, R. S.), enacted some nine months after the passage of the original National Bank Act (1864), by which a bank organized under a state law and having branch banks may become a national bank and retain its branch banks.

Concerning which we have this to say:

Congress was here dealing with state banks having branch banks outside of its territorial domicile—branch banks as such and as contradistinguished from additional offices or banking rooms within the territorial domicile of the bank, and what it then enacted as to these has naught to do with the question in judgment here, whether national banks may have **additional** banking houses or offices **within** the territorial area designated in its charter.

The state banks, seeking reincorporation as national banks, had, under their state charters, the

power to establish branch banks anywhere in the state and were not confined to a designated city, town or village.

The National Bank Act restricted the usual operation of national banks to the designated city, town or village.

The state banks, seeking reincorporation as national banks, sought and obtained congressional sanction for the continuance of existing branches.

The legislation sought and obtained was **special** and designed to secure extended powers for **particular institutions peculiarly situated**.

Branch banks, as such, are not an unusual incident to banking; they have been frequently expressly authorized and as frequently sustained as impliedly authorized; they have never been expressly prohibited by Congress, and that in the **special legislation** enacted in 1864 to permit state banks to convert themselves into national banks no thought was given, or should be assumed to have been given, to the powers under the general statutes of national banks, not previously organized as state banks; for the **subject-matter** then before the legislative minds was **state banks seeking reincorporation as national banks**, and **not** national banks, organized as such ab initio. What Congress enacted as to the former bore no necessary or proper relation to the powers of the latter, and to contend that an enabling act as to the former in any

way amounted to a legislative construction of existing laws as to the latter, is to say that Congress then had in mind, considered and construed the laws of a previous Congress pertaining to an entirely different subject-matter. To so assume is to disregard what is common knowledge as to congressional action and to base an argument on fancy, contrary to fact.

Another instance of subsequent legislation claimed to be legislative construction controlling this Court is that with respect to the St. Louis World's Fair enacted in 1901 (31 Stat., p. 1444, Sec. 21), which is another instance of special legislation for a particular purpose.

If this legislation was necessary in order **to meet and overcome the Department's then ruling**, based on the opinion of the Attorney-General that there could be neither branch banks outside of the designated domicile, nor additional offices or banking houses within the domicile, of course, such legislation is in no sense construction of previous legislation. Congress was not then itself construing the existing law; it was meeting and avoiding the construction of the Attorney-General.

The opposite contention comes to this: That the **express grant** of power to operate national banks in a special emergency in 1901 is a legislative declaration that the **implied powers** granted to national

banks in 1864 did not include the power to have more than one office or banking house at its designated domicile. Special and private legislation should not, in our judgment, ever be held to be legislative construction of general laws.

The legislation then enacted concerning branch banks on the Fair Grounds was a mere incident to the legislation in aid of the World's Fair. **Incidentally**, and in aid of the main project, the establishment of branch banks on the Fair Frounds was authorized. Clearly, such incidental provision should not be held to have involved such full consideration of the National Banking Act enacted in 1864 as to justify the assumption that Congress was then indulging in legislative construction of what was done by the Congress of a previous generation.

(c) Again, this legislation (31 Stats., p. 1444, Sec. 21) permitted any national bank in the City of St. Louis **or the State of Missouri** to conduct a national bank on the World's Fair Grounds, which were located partly in and partly outside of the City of St. Louis.

So that this legislation necessarily contemplated the maintenance of branch banks outside of the designated domicile of the parent bank.

Permitting, as it did, branch banks **outside** of the national bank's designated domicile, this legislation

can have no possible bearing on the question brought to the bar here, which is whether a national bank may have additional offices or banking houses **within** its designated domicile.

The other instance of like legislation is that concerning the Chicago World's Fair (27 Stat., p. 33), in which like authority in the same terms, *mutatis mutandis*, as is the legislation concerning the St. Louis World's Fair.

As to both the St. Louis and the Chicago World's Fairs, it is well to point out that they were operated by a commission provided for by acts of Congress. Unless the powers granted to these commissioners included the power to establish a bank or permit the operation of a branch bank on the World's Fair Grounds, there would have been no bank.

The act was intended to **vest power in the commissioners**, and not to enlarge or diminish the power of national banks, and so should not be held to constitute legislative construction of the National Bank Act.

State Laws.

It will, doubtless, be conceded that national banks, being corporate entities, created by national law, pursuant to the powers delegated to the national government by the Constitution, are subject to the **paramount authority** of the United States.

Having undertaken to exercise the power thus granted by the Constitution, it would seem clear that only the national government can regulate, enlarge or diminish the powers granted to its creatures to execute pro tanto the powers granted to the government.

And yet it is contended in this case that the statute of the **state** denying to state banks the right to establish branch banks includes national banks, and that, because a state bank in Missouri may not have **branch banks** located **outside** of its designated domicile, therefore a national bank may not have additional offices or banking houses **within** its domicile.

The statute of Missouri (Sec. 11737, R. S. Mo. 1919) does not even, in terms or by judicial construction, preclude even a state bank from having additional offices or banking houses **within its domicile**, and yet it is claimed that the state statute does just this with respect to national banks—concerning which the state has **no power to legislate** and **has not assumed to legislate**.

The Reason of the Thing.

No **good reason** has ever been suggested why any bank, state or national, should not have **two or more offices or banking houses**.

Yet, it is contended that Congress, although concededly there is no good reason therefore, has im-

pliedly done what concededly it never **expressly** did, i. e., it has **impliedly prohibited** additional offices when it **expressly** commanded that it should have "a" office.

Prohibition by implication is the somewhat novel proposition on which the state case rests.

We submit:

First. That without a good reason Congress should not, would not and did not, enact any prohibition in this instance.

Second. That if it has intended to do so it would have done in good, plain English—in words of one syllable—and would not have left it to this Court to spell out such prohibition by the very uncertain process of judicial construction.

Third. That as there is no **reason** for the prohibition and no **language** of prohibition there should be no **judgment** of prohibition.

Upon which considerations it is respectfully submitted that the judgment of the state court is erroneous, and should be reversed.

JAMES C. JONES,
FRANK H. SULLIVAN,
For Plaintiff in Error.

Jones, Hoeker, Sullivan & Angert,
506 Olive St., St. Louis, Mo.

SEP 15 1923

WM. B. STANSBURY

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK
IN ST. LOUIS,
Plaintiff in Error (and Petitioner
in Certiorari),

vs.

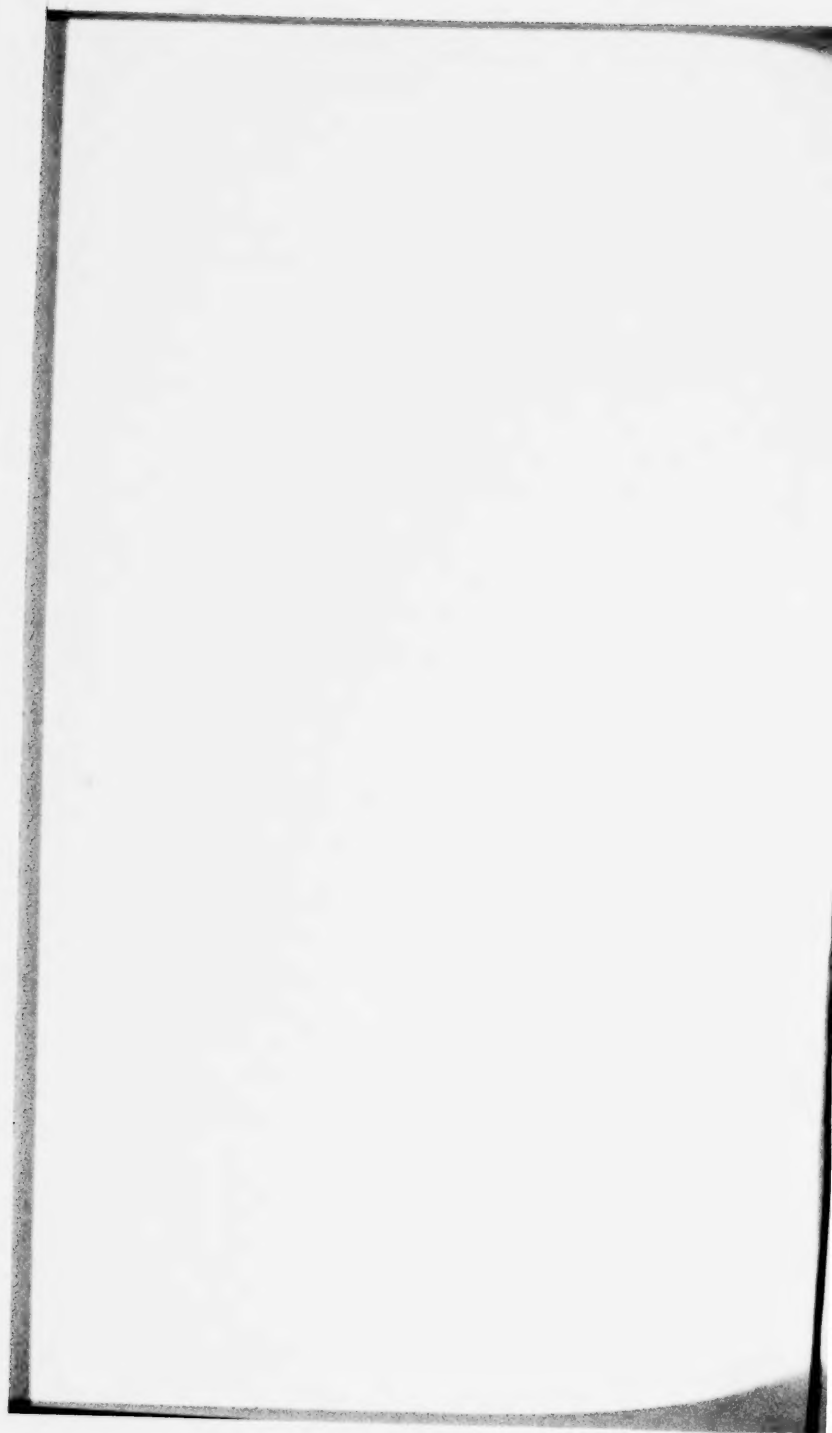
STATE OF MISSOURI, upon infor-
mation of **JESSE W. BARRETT,**
Attorney-General,
Defendant in Error (and Respond-
ent in Certiorari).

No. 252.

SUBSTITUTED BRIEF AND ARGUMENT FOR
PLAINTIFF IN ERROR.

✓ **FRANK B. KELLOGG,**
✓ **JAMES C. JONES,**
✓ **FRANK H. SULLIVAN,**
For Plaintiff in Error.

JONES, HOCKER, SULLIVAN & ANGERT,
506 Olive Street, St. Louis, Mo.



EXPLANATORY NOTE.

This brief and argument is intended as in substitution for the original brief and argument for plaintiff in error, filed at the October Term, 1922, and is offered because of the haste with which the former was prepared, by reason of the advancement of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

**FIRST NATIONAL BANK
IN ST. LOUIS,**

*Plaintiff in Error (and Petitioner
in Certiorari),*

vs.

**STATE OF MISSOURI, upon infor-
mation of JESSE W. BARRETT,
Attorney-General,**

*Defendant in Error (and Respond-
ent in Certiorari).*

No. 252.

**SUBSTITUTED BRIEF AND ARGUMENT FOR
PLAINTIFF IN ERROR.**

STATEMENT.

The Attorney-General of the State of Missouri filed in the Supreme Court of that state an information in *quo warranto* (Rec., pp. 1-3), wherein it was alleged: That the plaintiff in error was a banking association organized under the laws of the United States; that

by its articles of association and certificate of incorporation the City of St. Louis, in Missouri, was designated as its place of business; that for a number of years it had conducted its banking business at a designated building in that city; that it had recently opened a branch office at another place within the city for the transaction of its banking business and contemplated and intended to establish still other such branches in the city; and that the plaintiff in error was without authority of law to have or maintain branch offices for the conduct of its banking business within the City of St. Louis. The prayer was that the plaintiff in error be ousted of the asserted right.

Upon this showing an order to show cause issued (Rec., p. 4). On the prayer of the informant (Rec., p. 3) a temporary injunction issued (Rec., p. 4), restraining plaintiff in error from going forward with its plans to establish branch offices, pending the cause. The plaintiff in error seasonably, but unsuccessfully, asked the dissolution of this injunction as having been obtained in violation of the Revised Statutes of the United States, Section 5242 (Comp. St. 1916, Sec. 9834).

The plaintiff in error also filed its motion (Rec., p. 6) to dismiss the proceeding on the ground that the state and her Attorney-General did not possess the power of visitation attempted to be exercised.

It also submitted a demurrer (Rec., p. 6) in which it contended that the information stated no facts justifying the proceeding; that the Court was without jurisdiction thereof, and that the proceeding was one which only the Government of the United States could maintain.

In due course, and on March 3, 1923, the Court delivered its opinion (Rec., pp. 8-16) and pronounced its judgment (Rec., p. 7) ousting the plaintiff in error of the power and privilege of possessing and operating branch banking houses.

In apt time (Rec., pp. 17 *et seq.*) the plaintiff in error sued out its writ of error here, and, in doubt as to the proper method of review, has also applied for a writ of certiorari, which application has been docketed, and ordered to be submitted with the writ of error.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Missouri erred in holding that it lay within the province of the State of Missouri or the Attorney-General of the state to maintain such a proceeding as this to define the powers of a national banking association, and to restrain such an institution within the powers as thus defined (Assignment of Errors Nos. III, IV, VII, VIII, Rec., p. 18; Petition for Certiorari, pp. 6, 7 and 8).

II.

The Supreme Court of the State of Missouri erred in denying the contention of the plaintiff in error that, the plaintiff in error being a national banking association organized under the laws of the United States, the powers asserted by it being those granted or grantable only by the United States, for that reason it was not within the sovereign authority of the State of Missouri to define the powers of the plaintiff in error under its charter or to restrain it in the exercise thereof (Assignments of Error Nos. V, VI and VII, Rec., p. 18; Petition for Certiorari, pp. 8 and 9).

III.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that the proceeding here involved was one of which the Government of the United States has sole and exclusive sovereignty and power; and that, therefore, the state and her Attorney-General were without power or authority to institute or maintain such a proceeding (Assignments of Error V, VI and VII, Rec., p. 18; Petition for Certiorari, pp. 8 and 9).

IV.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that neither the State of Missouri nor the Attorney-General thereof had power or authority to question the right of the plaintiff in error under the laws of the United States to establish and operate branches of its banking business in the City of St. Louis, State of Missouri (Assignment of Error No. VIII, Rec., p. 18; Petition for Certiorari, p. 8).

V.

The Supreme Court of Missouri erred in denying the contention of the petitioner that Sections 11,684 and 11,737 of the Revised Statutes of Missouri of 1919, if interpreted to restrict the powers of national

banking associations in the matter of branch offices or banks, are unconstitutional and void because dealing with a matter within the exclusive province of the Federal Government (Assignment of Error No. X, Petition for Certiorari, p. 9).

VI.

The Supreme Court of Missouri erred in holding and determining that acts of Congress conferring jurisdiction upon state courts over actions against national banking associations (Judicial Code, Section 24, Subdivision 16; R. S. U. S., Sections 5136, 5138, and Act of July 12, 1882, found in Compiled Statutes 1916, Section 9668) conferred authority upon the state, and jurisdiction upon her courts to proceed as here in the exercise of a sovereign power, which is the sole prerogative of the National Government (Assignment of Error II, Rec., p. 18; Petition for Certiorari, p. 6).

VII.

Under its charter and the acts of Congress relating to national banking associations, the plaintiff in error is possessed of power to establish and maintain branch offices in the City of St. Louis for the conduct of its banking business; and the Supreme Court of Missouri is in error in ruling to the contrary (Assignment of Error IX, Rec., p. 18; Petition for Certiorari, p. 8).

STATE STATUTES

REFERRED TO BY THE MISSOURI SUPREME
COURT (Rec., p. 15).

Revised Statutes of Missouri of 1919, Article I of Chapter 108, providing for the establishment of a state banking department:

“Sec. 11684. *Prohibition of banking business.*
—No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a trans-Atlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise (Laws 1915, p. 108).”

Article II of Chapter 108, providing for the incorporation of banks:

“Sec. 11737. *Rights and powers.*—Every such corporation shall be authorized and empowered:

“1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also by buying, investing in, selling and discounting negotiable and non-negotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest: *Provided, however, that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house.*”

BRIEF.

I.

The state is without power to bring proceedings to question compliance by a national bank with its charter.

(a) National banks are instrumentalities of the National Government.

McCulloch v. Maryland, 4 Wheat. 318;
First National Bank v. California, Ms. Op. June 4, 1923, No. 276, October Term, 1922.

(b) A proceeding of this kind is the prerogative of the sovereign which created the corporation.

Ames v. Kansas, 111 U. S. 460;
Territory v. Lockwood, 3 Wall. 238;
McClung v. Silliman, 6 Wheat. 303;
First National Bank v. Union Trust Co., 244 U. S. 427;
Van Reed v. People's National Bank, 198 U. S. 554;
Massachusetts v. Mellon, Ms. Op. June 4, 1923 (No. 24 Original October Term, 1922);
Terrett v. Taylor, 6 Cranch. 51;
California v. Pacific Railroad, 127 U. S. 1;
Hale v. Henkel, 201 U. S. 43;

McCulloch v. Maryland, 4 Wheat. 316;
Osborn v. United States Bank, 9 Wheat. 738;
Farmers' Bank v. Minnesota, 232 U. S. 508.

(c) The proper relations between our dual governments make it impossible that a state should possess such power.

Authorities, *supra*;
Ableman v. Booth, 21 How. 518;
Tarble's Case, 13 Wall. 405;
Tennessee v. Davis, 100 U. S. 257.

(d) The enforcement of charter limitations on national banks is denied to citizens because it is the function of the National Government.

National Bank v. Matthews, 98 U. S. 621;
National Bank v. Whitney, 103 U. S. 99;
Reynolds v. National Bank, 112 U. S. 405.

(e) Such a power cannot exist in the states without a sacrifice of the uniformity which was one of the purposes of the National Bank Act.

Easton v. Iowa, 188 U. S. 220.

(f) The Congress, in conferring jurisdiction on courts of the states over actions against national banks, have reserved actions of this type to the Gen-

eral Government, and jurisdiction thereof to the national courts.

- 12 St. L. 680, Ch. 58, Sec. 55;
- 13 St. L. 116, Ch. 106, Sec. 56;
- Judicial Code, Sec. 24, Sub. 16;
- 18 St. L. 320, Ch. 80, Sec. 300 B;
- 22 St. L. 163, Ch. 290, Sec. 4;
- 24 St. L. 554, Ch. 373, Sec. 4.

(g) State courts have denied the power here under consideration.

- State *ex rel.* v. Curtis, 35 Conn. 374;
- State *ex rel.* v. Bowen, 8 S. C. 400;
- Harkness v. Guthrie, 27 Utah 248, affirmed here,
 sub. nom Guthrie v. Harkness, 199 U. S.
 157;
- State *ex rel.* v. Railway Co., 7 L. R. A. 319.

II.

A state statute attempting to limit or define the powers of a national bank is invalid.

(a) It is only general legislation of the state which is binding on national banks.

- National Bank v. Commonwealth, 9 Wall. 353;
- Davis v. Elmira Savings Bank, 161 U. S. 275;
- McClellan v. Chipman, 164 U. S. 347;
- First National Bank v. California, Ms. Op. No.
 276, October Term, 1922.

(b) The Congress, having defined the powers of the bank, have, in so doing, by implication, excluded those not conferred, and hence occupied the entire field of legislation on that subject.

Thomas v. Railroad Co., 101 U. S. 71;
Penn. Co. v. Railway Co., 118 U. S. 291;
Central Transportation Co. v. Pullman Co., 139
U. S. 24;
First National Bank v. National Exchange
Bank, 92 U. S. 122.

(c) State legislation, in definition of the powers of a national bank, necessarily conflicts with the regulations, express or implied, prescribed by the Congress.

Easton v. Iowa, 188 U. S. 220;
Farmers Bank v. Dearing, 91 U. S. 29;
California Bank v. Kennedy, 167 U. S. 362;
First National Bank v. California, *supra*.

(d) State statutes defining the manner in which national banks shall exercise their franchises enjoyed from the General Government are invalid because the sovereignty of the state does not so far extend to them.

McCulloch v. Maryland, *supra*;
Osborne v. United States Bank, *supra*.

(e) Such a statute is the exercise of visitorial power which pertains exclusively to the Congress, and which

the Congress have, in terms, forbidden to state legislatures.

Guthrie v. Harkness, 199 U. S. 157;
R. S., Sec. 5241;
38 St. L. (Part I) 272, Ch. 6, Sec. 21.

III.

The bank, in the exercise of its corporate functions, is not limited to a single building in the city in which it does business.

(a) Banking is a natural right, not a privilege.

Bank of Augusta v. Earle, 13 Pet. 517;
Bank of California v. San Francisco, 142 Cal.
276;
Curtiss v. Leavitt, 15 N. Y. 9.

(b) Except as restrained by the Legislature, a corporation may conduct its business at any point within the jurisdiction of the sovereign which gives it being.

Fletcher on Corporations, Vol. 2, Ch. 21, Sec.
806, and cases cited;
Lloyd's Trustees v. Lynchburg, 113 Va. 627.

(c) The function here in question is within the incidental powers of a national bank unless forbidden by the Congress.

First National Bank v. National Exchange
Bank, 92 U. S. 122;
Green Bay Co. v. Union etc. Co., 107 U. S. 98.

(d) R. S., Sec. 5136, deals only with the city, town or village designated in the charter, and not with a place of business within the city, town or village.

McCormick v. Market National Bank, 162 Ill. 108 (s. c.), 165 U. S. 538.

(e) R. S., Sec. 5190, does not limit a national bank to a single office for the transaction of its business.

Merchants National Bank v. State National Bank, 10 Wall. 604;

R. S. U. S., Sec. 5136;

22 St. L. 162, Ch. 290;

Century Dictionary, article "a or an";

United States v. Oregon etc. Ry. Co., 164 U. S. 526;

United States v. Perry, 133 Fed. 841;

National Union v. Copeland, 171 Mass. 257;

State *ex rel.* v. Martin, 60 Ark. 334;

Commonwealth v. Wetzel, 2 S. W. Rep. (Ky.) 125.

IV.

There has been no departmental construction which can be permitted to control the construction of the statute.

Studebaker v. Perry, 184 U. S. 259;

United States v. Pugh, 99 U. S. 265;

United States v. Hahn, 107 U. S. 402;

Swift & Co. v. United States, 105 U. S. 691;
United States v. Graham, 110 U. S. 219;
Merritt v. Cameron, 137 U. S. 542;
United States v. Healy, 160 U. S. 136;
Louisville etc. Ry. Co. v. Kentucky, 161 U. S.
677;
Wisconsin etc. Ry. Co. v. United States, 164
U. S. 190.

V.

There has been no binding congressional interpretation.

R. S., Sec. 5155;
27 St. L. 33, c. 71;
31 St. L. 1444, Ch. 864, Sec. 21;
26 St. L. 62, Ch. 156;
Act of April 26, 1922;
Postmaster General v. Early, 12 Wheat, 136;
United States v. Claflin, 97 U. S. 546;
Endlich on Interpretation of Statutes (Ed.
1888), Sec. 372.

ARGUMENT.

I.

The Power of the State in the Premises.

At the October Term, 1922, this case was argued and submitted, following which this order was entered:

“It is ordered that this case be restored to the docket for reargument at the next term on the issue whether the state had authority to institute and maintain a proceeding to question compliance by a national bank with its charter.”

This question, of course, lies at the threshold of the case. It is an important question, for the reason that it necessarily involves an inquiry into the division of powers between state and national governments, and the power of state governments to control agencies inaugurated by the National Government in the execution of its own constitutional functions.

For, from *McCulloch v. Maryland*, 4 Wheat. 316, to *First National Bank v. California*, Ms. Op. June 4, 1923 (No. 276, October Term, 1922), national banks, organized under whatsoever acts of Congress, are declared to be “instrumentalities of the Federal Government * * * designed to be used to aid the Gov-

ernment in the administration of an important branch of the public service.”

Indeed, such has been always recognized as the only justification for their creation by Congress. Banking corporations, as mere business institutions, the Congress could not constitutionally authorize. This, too, was declared as early as *McCulloch v. Maryland*, *supra*.

We point to the character of these institutions as of itself indicating that they cannot be withdrawn by state action from the control of the General Government, any more than can other agencies of the United States created as aids in the performance of its constitutional functions.

SUCH A PROCEEDING IS THE EXCLUSIVE FUNCTION OF
THE NATIONAL GOVERNMENT.

A proceeding such as here is the exercise of supreme sovereignty.

As said by Mr. Justice Waite, speaking for the Court, in *Ames v. Kansas*, 111 U. S. 460:

“The original common-law writ of *quo warranto* was a civil writ, at the suit of the crown, and not a criminal prosecution (*Rex v. Marsden*, 3 Burr. 1812, 1817). *It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them* (Com. Dig.

Quo Warranto A), and the first process was summons (*Id.* C. 2). This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a *quo warranto*, which, in its origin, was 'criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or *seize it for the crown*' (3 Bl. Com. 263). Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, *seizing the franchise*, or ousting the wrongful possessor; the fine being nominal only' (3 Bl. Com., *supra*; *The King v. Francis*, 2 T. R. 484; *Bac. Ab. Tit. Information D*; 2 *Kyd on Corp.* 439)."

We are not dealing here with the mere *names* of things, nor did that case so deal with the question. The writ of *quo warranto* has always been the appropriate means whereby the sovereign restrains his corporations within the limits of the grant. And, by whatsoever name termed, a proceeding having that object in view inheres in the sovereign which made the grant, as is definitely stated in *Ames v. Kansas*, *supra*.

Consideration of the cases in which this Court has had occasion to define the relations between the two governments, and the relations of the one to corporations of the other, do not leave the question here under consideration in doubt.

The nearest approach to the exact question is found in *Territory v. Lockwood*, 3 Wall. 238, where the territory undertook by *quo warranto* proceedings to remove one from an office, to be exercised in the territory, but under appointment from the United States. The right to maintain the proceeding was held to pertain only to the General Government. Mr. Justice Swayne, speaking for the Court, after pointing out the prerogative character of such a proceeding, said:

“In *Wallace v. Anderson*, this Court said, ‘that a writ of *quo warranto* could not be maintained except at the instance of the Government; as this writ was issued by a private individual, without the authority of the Government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question.’ In the case of the *Miners’ Bank v. United States*, on the relation of Grant, the information was filed in the name of the United States in the District Court of Iowa Territory. The sufficiency of the information in this respect does not appear to have been questioned. A state court cannot issue a writ of mandamus to an officer of the United States. ‘His conduct can only be controlled by the power that created him.’ The validity of a patent for land issued by the United States ‘is a question exclusively between the sovereignty making the grant and the grantee.’

“The Judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the territory have no agency in appointing them and no power to remove them. The territorial legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the territory to prosecute such an information as this would carry with it the power of a motion without the consent of the government from which the appointment was derived. This the territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the states as to the federal officers whose duties are to be discharged within their respective limits. *The right to institute such proceedings is inherently in the Government of the nation.* We do not find that it has been delegated to the territory.”

It is believed that a proceeding of this nature as a motion from office is fundamentally not different from such a proceeding addressed to a corporation to inquire into the exercise of a corporate franchise. They each inherently pertain to the sovereignty which created the office or granted the franchise. If this be true, then the Lockwood case is positive authority that the state may not take over functions of the

National Government in the manner in which it is here attempted. The functions and nature of the proceeding, as explained in this case, differ not a whit from what was said of it in *Ames v. Kansas*, *supra*, where corporate franchises were in question.

In *McClung v. Silliman*, 6 Wheat. 303, referred to in the *Lockwood* case, the power of a state court to address a writ of *mandamus* to a register of an United States land office was denied, Mr. Justice Johnson for the Court observing:

“It is not easy to conceive on what legal ground a state tribunal can in any instance exercise the power of issuing a *mandamus* to the register of a land office. * * * And here it is obvious that he is to be regarded either as an officer of that government or as its private agent. In the one capacity or the other his conduct can only be controlled by the power that created him; * * *.”

In *First National Bank v. Union Trust Company*, 244 U. S. 427, congressional sanction was expressly held required for such a proceeding as here by state authorities. That case had many features similar to this, with the basic exception that *in that case there was congressional sanction for the proceeding; while, in this case, there is no claim of such*. In that case the Attorney-General of the state had brought such a proceeding in a state court to test the right of a na-

tional bank to exercise certain powers claimed under an act of Congress. This Court justified the proceeding on the ground that Congress had authorized it by the terms of the particular enactment under consideration. The narrow ground upon which the case proceeded in this respect is indicated by this language of Mr. Chief Justice White, speaking for the majority:

“The question of the competency of the procedure and the right to administer the remedy sought then remains. It involves a challenge of the right of the state Attorney-General to resort in a state court to proceedings in the nature of *quo warranto* to test the power of the corporation to exert the particular functions given by the act of Congress because they were inherently federal in character, enjoyed by a federal corporation and susceptible only of being directly tested in a federal court. Support for the challenge in argument is rested upon *Albeman v. Booth*, 21 How. 506; *Tarble's case*, 13 Wall. 397; *Van Reed v. People's National Bank*, 198 U. S. 554, 557; *State ex rel. Wilcox v. Curtis*, 35 Connecticut 374. But without inquiring into the merits of the doctrine upon which the proposition rests, we think when the contention is tested by a consideration of the subject matter of this *particular controversy* it cannot be sustained. In other words, we are of opinion that as the particular functions in question by the express terms of the act of Congress were given

only 'when not in contravention of state or local law,' the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and *we place our conclusion on that ground.*"

Not all the members of the court agreed to this interpretation of the act of Congress there under review and, for the minority, Mr. Justice Van Devanter said:

"The writ of quo warranto was a prerogative writ and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege or power claimed under the United States, it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned (Wallach v. Anderson, 5 Wheat. 291; Territory v. Lockwood, 3 Wall. 236; Newman v. Frizzell, 238 U. S. 537). As is said in the Lockwood case, 'the right to institute such proceedings is inherently in the government of the nation.' This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose and 'are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit' (Davis v. Elmira Sav-

ings Bank, 161 U. S. 275, 283; Van Reed v. People's National Bank, 198 U. S. 554-557). Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them (McClung v. Silliman, 6 Wheat. 598, 605). If it were otherwise, the supremacy of the United States and of its Constitution and laws would be seriously imperiled (Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Tennessee v. Davis, 100 U. S. 257; State *ex rel.* Wilcox v. Curtis, 35 Conn. 374).

"Thus much, as I understand it, is conceded in this Court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress."

The effect of the opinion in that case is that the state may proceed against a national bank to define the limits of its charter and restrain it within the limits thereof as so defined *when, and only when, Congress shall have so authorized*, and in cases where the power, if existing, is measured by the law of the state, as was the situation in that instance.

This is in keeping with the pronouncement in Van Reed v. People's National Bank, 198 U. S. 554, where, in upholding the validity of R. S., Sec. 5242, Mr. Justice Day, speaking for the Court, said that national banks "are subject to the control of Congress and

are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit."

The whole matter was summed up, and, in our opinion, put at rest, in *Massachusetts v. Mellon*, Ms. Op. June 4, 1923 (No. 24, Original, of the October Term, 1922), where Mr. Justice Sutherland, speaking for the Court, said:

"While the state, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois and Chicago District, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

To apply that pronouncement to the case in hand it may well be said: When the people of the United States created the National Government and endowed it with sovereign powers in certain respects, including the sovereign power to create national banks, they thereby conferred upon it the usual incidents of such sovereignty, *including the exclusive power and duty, as parens patriae, to restrain its*

corporate creatures within the limits of the corporate grant. No other view is at all compatible with the proper relations of the dual sovereignty under which we live. If the function here dealt with be a sovereign right (and no one doubts this), it must be the right of the sovereign which created the corporation, because the right of restraint flows exclusively from the right of creation. It was because, and only because, corporate grants flowed from the Crown that the Crown might restrain their exercise, and resume them if abused.

In *Terrett v. Taylor*, 9 Cranch 51, Mr. Justice Story, speaking for the Court, observed:

“A private corporation created by the Legislature may lose its franchises by a misuser or a nonuser of them, and *they may be resumed* by the Government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture.”

The control by the state of a corporate franchise granted by the General Government is nothing other than control of a function of the General Government itself. This is shown by the opinion of this Court in *California v. Pacific Railroad Company*, 127 U. S. 1 (40 *et seq.*), where the power of the state to tax a corporate franchise granted by the Congress was denied for this reason. We quote these excerpts

from the opinion of Mr. Justice Bradley in that pronouncement:

“They (i. e., the franchises) were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens.

* * * * *

“What is a franchise? Under the English law Blackstone defines it as ‘a royal privilege, or branch of the king’s prerogative, subsisting in the hands of a subject’ (2 Bl. Com. 37). Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security.

* * * * *

“No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.*

* * * * *

“The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government and repugnant to its paramount sovereignty.”

If, as there declared, taxation by a state of a corporate franchise emanating from the General Government is in effect taxation of the functions of that government, *how much the more must it be true that direct proceedings by the state to control the exercise of the franchise is in effect an effort to control the functions of the General Government?*

The State of Missouri would quickly resent, doubtless, any effort of the Federal Government to restrain the state's own corporate creatures within the limits of the powers conferred upon them, or, mayhap, to forfeit their corporate charters for departures therefrom. What considerations are there which lead to the affirmance of the power of the state here asserted, and to the denial of a coequal power of the General Government over corporations created by the state?

The relations of the two governments in this respect were carefully stated by Mr. Justice Brown in *Hale v. Henkel*, 201 U. S. 43 (75), where, after declaring the plenary powers of the General Government to enforce its own constitutional enactments

upon corporations created by the state, it was significantly said:

“It is not intended to intimate, however, that it” (the Federal Government) “has a general visitatorial power over state corporations.”

In view of that utterance it must be held that the powers of the state as to national corporations are limited to the enforcement of its own *valid* enactments; *or else somewhat of the sovereign powers conferred by the Constitution upon the National Government were reserved for enforcement by the states.* The latter is utterly subversive of our entire theory of government.

The cases of *McCulloch v. Maryland*, 4 Wheat. 316, and *Osborne v. United States Bank*, 9 Wheat. 738, dealt with much more than the power of the states to lay an incidental tax upon the property of a bank created by the National Government.

For, says Charles Warren in the Supreme Court, in *United States History*, Vol. I, p. 503, at the time those cases came to the bar of the Court for consideration this was the situation:

“Indiana in its Constitution of 1816 prohibited the establishment of branches of any bank chartered outside of the state. The Illinois Constitution of 1818 prohibited the existence of any but state banks within the states. In November, 1817,

Tennessee imposed a tax of \$50,000 on any other than a state bank doing business in the state; in December, 1817, Georgia laid a tax of 31¼ per cent on every \$100 of bank stock employed within the state (the Legislature declaring, by resolve, the next year, that this tax was only intended to apply to branches of the Bank of the United States); North Carolina, in December, 1818, imposed an annual tax of \$5,000 on the branches of the bank. In February, 1818, there was enacted in Maryland a statute laying a heavy stamp tax on all notes issued by banks chartered outside the state, which tax might be commuted by the annual payment of \$15,000; in January, 1819, Kentucky imposed a still heavier tax, compelling each branch in that state to pay \$60,000 annually; the next month, February, 1819, Ohio rivaled Kentucky with a tax of \$50,000 on each branch."

It was this attempt by the states to regulate, control and forbid the operations of agencies of the Federal Government which furnished the basis for the judgments in those two historic proceedings. How can the power of the state here asserted stand, in the face of this language of Mr. Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 229 (p. 435):

"The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that

body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them."

The doctrine was further elaborated in *Osborne v. United States Bank*, 9 Wheat. 863, and the incapacity of the state to control national banks declared by the Chief Justice in this language:

"The business of the bank constitutes its capacity to perform its functions as a machine for the money transactions of the Government. Its corporate character is merely an incident which enables it to transact that business more beneficially.

"Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so. If, instead of the Secretary of the Treasury, distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expense, the profits of the banking business, in-

stead of other emoluments to be drawn from the treasury, which banking business was essential to the operations of the Government, would each State in the Union possess a right to control these operations?"

This inquiry the opinion answers in the negative. But yesterday, in *First National Bank v. California*, *supra*, the principles declared in these cases, and the others following them, were cited and applied.

Commenting on *McCulloch v. Maryland*, in *Farmers Bank v. Minnesota*, 232 U. S. 508 (521), Mr. Justice Brown, speaking for the Court, said:

"The supremacy of the Federal Constitution and the laws made in pursuance thereof, and *the entire independence of the General Government from any control by the respective states, were the fundamental grounds of the decision*. The principle has never since been departed from, and has often been reasserted and applied."

Again demonstrating that state control of corporations created by the National Government is in effect to control the functions of that Government itself.

THE FUNDAMENTAL DIVISION OF SOVEREIGNTY.

Many cases, of which the following are typical, point to the fundamental division of sovereignty under our dual system of government, and the impos-

sibility of permitting the State to exercise those pertaining to the National Government.

In *Abelman v. Booth*, 21 How. 516, this division of sovereignty was thus defined by Mr. Chief Justice Taney (p. 138):

“And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned.”

And in *Tarble's case*, 13 Wall. 405, where a state court discharged a deserter from the army on the ground that his enlistment was invalid, Mr. Justice

Field, delivering the opinion of the Court, said on the same subject, after quoting the above extract from Ableman's case:

"There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments."

* * * * *

"Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement, neither is responsible to the other. How their respective laws shall be

enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

And in *Tennessee v. Davis*, 100 U. S. 257 (263), Mr. Justice Strong said for the Court:

"The United States is a Government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

PRIVATE PERSONS DENIED THE RIGHT BECAUSE IT IS
THE EXCLUSIVE PROVINCE OF THE UNITED STATES.

This Court has frequently had occasion to announce the rule that private persons may not question compliance by a national bank with its charter powers—the reason assigned for the rule being that such is the exclusive function of the National Government.

Thus, in *National Bank v. Matthews*, 98 U. S. 621 (629), Mr. Justice Swayne, speaking for the Court, said:

“The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.

“That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. *A private person cannot, directly or indirectly, usurp this function of the Government.*”

This language was quoted with approval in *National Bank v. Whitney*, 103 U. S. 99 (102); and in *Reynolds v. Crawfordsville National Bank*, 112 U. S. 405 (411), it was said that “only the sovereign can object” to accomplished acts of national banks in excess of their powers.

These cases demonstrate that the function here under question is inherently in the General Government, *which necessarily excludes its exercise by the state.*

CONSEQUENCES OF A CONTRARY RULE.

The consequences of a contrary conclusion to that here contended for are worthy of consideration. As said by Mr. Justice Shiras in *Easton v. Iowa*, 188

U. S. 220 (229), the purpose of the Congress in the enactment of the National Bank Act was the erection of an uniform system throughout the country. This purpose will be frustrated in large measure if each state possesses the power to assume the regulatory functions of the National Government with respect thereto.

And the confusion resulting from such a power being lodged in the states will not be limited to National Banks. In perfecting the monetary system of the country, the Congress has created a series of Federal Reserve Banks, operating throughout the country, having the most important and delicate relations to the finances of the country, and under the most direct control of the Government in the manner provided by the act. If National Banks are held subject to visitorial powers of the state—if the state may question the manner in which *these* perform their corporate functions, considerations are lacking for denying a similar control as to *those*.

When the country was in the throes of the late war the Congress created the Emergency Fleet Corporation and the United States Grain Corporation. It is only necessary to mention the occasion for, and the overwhelming importance of, these two creations to demonstrate that they could not have been submitted to state control, in the manner here attempted, without grave risk of the impairment of their efficiency in

a serious emergency, wherein delays and confusion would have entirely frustrated the purpose of the Government in their creation. And yet no reason can be assigned for conceding the power here asserted, which is not equally applicable in the instances suggested.

NO NECESSITY FOR SUCH POWERS IN THE STATES.

Nor is there any *necessity* for the assumption of such a power on the part of the state.

The Congress, by the National Bank Act (12 St. L. 680, Ch. 58, Sec. 55, 13 St. L. 116, Ch. 106, Sec. 56, R. S. 380) made provision for the prosecution in behalf of the National Government of all actions of a visitorial nature against national banks; and by the Judiciary Act (Judicial Code, Sec. 24, Sub. 16), conferred plenary jurisdiction on the national courts to hear and determine such.

We think there is no general belief that the functions of the General Government are so illy executed as to require that the execution of the laws of the United States should be intrusted to the states of the Union.

THE CONGRESS HAVE NOT CONFERRED THE POWER.

It is not and cannot be successfully asserted that the Congress has attempted to confer the power here under inquiry upon the states.

An amendment to the National Bank Act in 1875 (18 St. L. 320, Ch. 80, Sec. 300-B) gave the courts of the states concurrent jurisdiction with the national courts over actions against national banks.

The Act of July 12, 1882 (22 St. L. 163, Ch. 290, Sec. 4) provided that jurisdiction of actions against national banks should be the same as and not other than jurisdiction of actions against banks not organized under the laws of the United States, except, significantly, "*suits between them and the United States, or its officers and agents;*" while the Judiciary Act of 1887-1888 (24 St. L. 554, Ch. 373, Sec. 4; 25 St. L. 436, Ch. 866, Sec. 4), provides that for jurisdictional purposes they shall be deemed citizens of the states in which they do business, again excepting "*cases commenced by the United States or any officer thereof.*" The Judicial Code (Act of March 3, 1911, 36 St. L. 1092, Ch. 231, Sec. 24, Sup. 16), after providing for jurisdiction in the national courts of actions against national banks by the Government or its officers, significantly provides that as to "all other actions" they shall be deemed citizens of the states in which they do business.

These statutes carry ample and commendable provisions for jurisdiction in the proper state courts of ordinary actions *inter partes* by or against national banks. They are entirely lacking in any suggestion of an intention to confer upon the states the sovereign

power of the United States in the enforcement of its own laws, and the control of its own agencies. It is one thing for the Congress to provide that state courts may entertain actions against national banks. It is quite another to provide that the state may assume functions inherent in the National Government in the sovereign regulation of its agencies. Such a surrender of the constitutional powers and duties of the United States should certainly not rest upon implication. In this case, there is not even a fair inference of such an intention in any legislation by the Congress.

THE STATE COURTS DENY THE POWER.

The power here being discussed has been the subject of examination by certain courts of the states, and denied.

The case of *State ex rel. v. Curtis*, 35 Conn. 374, was referred to in both opinions here in *First National Bank v. Union Trust Company*, *supra*. The opinion in that case is a very satisfactory exposition of this question, and expressly denies the power of the state which is here asserted. It is there said:

“The power to create a corporation is an attribute of sovereignty, and the Government of the United States created the corporation in question, in the exercise of that independent and supreme sovereign power which the people dele-

gated to it by the Constitution. It is, therefore, the creature of that sovereignty, and amenable to and controllable by it and none other. * * *

After dealing with the prerogative nature of a proceeding such as here, the Connecticut Court said:

“Upon the same principles the information can lie only in the name of the United States, and in the federal courts, against those who invade a franchise *grantable or granted* by the National Government.

“As then the corporation in question is the creature of federal sovereignty, and in respect to its internal organization, operation and continual existence, is amenable to and controlled by that sovereignty alone; and as the writ in question is properly grantable by that sovereignty alone whose franchise has been invaded and violated, it would seem upon principle too clear for argument (if there be nothing more in the case), that the relator has erred in invoking the interference of another uninvaded and unviolated sovereignty, and the court below have erred in assuming jurisdiction and granting the writ.”

Dealing with the *factum* of federal incorporation, it was said:

“It was not created by us; it does not perform its functions under our authority, and it is the creature of and controllable by another and superior sovereignty. That other sovereignty is

exercised over the whole country, irrespective of state lines or state authority. It places its officers and agents and instruments wherever its necessities or its interests require, and necessarily within the limits of the states. With those officers and agents and instruments, in the exercise of their functions, state authority can in no way interfere. The national banks are its instruments by which it performs its functions in establishing a national currency; on that fact their constitutionality is placed, and in the exercise of the powers conferred upon them they are as independent of state control as the army, or navy, or the officers of the Subtreasury and Custom House, or any other instrumentality by which the functions of the Federal Government are performed. No other view is compatible with the principles of our own jurisprudence, or those recognized and declared by the Supreme Court of the United States in numerous cases, and particularly in the exhaustive opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheaton 316. * * *

“Nor has there been any invasion of the sovereignty of this state, or violation of its laws, or any offense which the state is called upon to redress in its own behalf. It is a clear principle that where there has been no offense there can be no judicial jurisdiction, and equally clear that *a state has no authority to enforce a national law in behalf of the National Government.*

“And this is one of the class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the

National Government. The corporation in question, being the creature and instrument of that government, must necessarily be subject to that alone. By the common law and by our statute an information of this character lies as well to deprive a corporation of its charter as to determine the rights of its competing officers, and if the relator is right in this claim, its charter can be taken away and its franchises seized by the courts of the state. Nothing could be more repugnant in character than such an unauthorized interference, for such a purpose or for any purpose."

Kindred thereto is the opinion of the Supreme Court of South Carolina denying the validity of proceedings by the Attorney-General of that state to remove a presidential elector from office, of which the Court said (*State ex rel. v. Bowen*, 8 S. C. 400):

*"The familiar rule governing proceedings by quo warranto is that only the sovereign from whom the office, franchise or liberty—that is, the subject of controversy—originated, and into whose hands the same, if forfeited, would return, can maintain the remedy or authorize it by the allowance of his name as a means of asserting the title of right of a citizen to the same. * * **

"It is very clear that if the action in the nature of quo warranto is an appropriate remedy under the claims made in behalf of the individ-

uals who united with the state as plaintiffs, *such proceedings should be presented in the name of the United States.*”

In *Harkness v. Guthrie*, 27 Utah 248, was involved the common-law right of a shareholder to inspect the books of a national bank. In distinguishing this right of the shareholder from the sovereign right of visitation, the Utah Court observed:

“In the United States visitorial power over all except private eleemosynary corporations existing under and by virtue of the laws of a state vests in the state, and, as to those formed under an act of Congress, it vests in the General Government and is exercised through the medium of the courts, or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated in Merrill on Mandamus, Sec. 175, that ‘visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings.’ ”

That case came here, and the views of the Utah Court were approved (*Guthrie v. Harkness*, 199 U. S. 156). It was held that the common-law right of the shareholder to examine the books of the corporation was one thing; the power of visitation of the sovereign another.

Mr. Justice Day, speaking for the Court, said (199 U. S., l. c. 157-158):

“The visitation of civil corporations is by the Government itself, through the medium of the courts of justice. * * *

“At common law the right of visitation was exercised by the king as to civil corporations and as to eleemosynary ones by the founder or donor (1 Cooley’s Blackstone 481).”

The other side of the shield is presented by the opinion of the Supreme Court of Ohio in *State ex rel. v. Cincinnati etc. Railway Co.*, 7 Lawyers’ Reports Annotated 319. This was a proceeding in *quo warranto* against a railroad company chartered by the state, for a violation of its charter by reason of discriminations in interstate commerce. Because of the paramount right of Congress to regulate interstate commerce, the respondent challenged the right of the state to so proceed.

The Ohio Court denied the contention, saying:

“As the state was not bound to create it in the first place, it is not bound to maintain it, after having done so, if it violates the laws or public policy of the state or misuses its franchises to oppress the citizens thereof.

“For such offenses the state, acting through its Legislature and courts, and in the exercise of a sound discretion, may either destroy the cor-

poration entirely, by forfeiting its charter, or oust it from the wrongful exercise of its powers; and if, instead of, or in addition to, misusing the franchises actually conferred, it usurps others, the circumstance that the usurped franchises relate to and concern commerce between the states ought not to deprive the state of its visitorial power. *If the state creating the corporation is deprived of its power, none exist elsewhere. 'The government creating the corporation can alone institute such a proceeding (quo warranto to adjudge forfeiture of a corporate franchise), since it may waive a broken condition of a compact made with it' (Angel & A. Corp., Sec. 777, and cases cited. See note 6).'*"

Such are the pertinent authorities on the question. That they deny the power of the state here under inquiry cannot be gainsaid.

NEITHER THE STATE NOR THE STATE COURT ASSERTS ITS
EXISTENCE.

Indeed, no such power is either asserted by the state nor found to exist by the state court.

The brief of the learned Attorney-General will be searched in vain for any assertion of power inherent in the state to enforce upon a national bank observance of its charter powers and duties. Likewise, the opinion of the state court. The brief filed in

behalf of various Attorneys-General of sundry states asserts no such power.

The argument in behalf of the state and the opinion of the state court do no more than contend: The Congress have not conferred the questioned power on the bank; the state law forbids its exercise (of which anon); *and the state may enforce upon the bank observance of its statutes.*

Certainly no authority is cited from any source justifying the conclusion that the State may thus assume functions of the General Government.

Various decisions are cited in which actions have been held proper for the vindication of *private right*—but none asserting that the state is *parens patriæ* in the matter of restraining the activities of agencies of the United States.

Much stress is laid apparently upon *First National Bank v. Commonwealth*, 143 Ky. 816, in which the Kentucky Court affirmed the right of that state to enforce upon a national bank its statutes escheating¹ real property, if held beyond the period of time allowed by the state statute. But a state has powers respecting the devolution of title to real estate within its borders, which do not exist with regard to the control of agencies of the General Government in other respects. This principle may justify the conclusion at which the Kentucky Court arrived. Hav-

ing in mind the specific legislation of the Congress concerning the right of national banks to acquire and hold title to real estate, however, it seems more than probable that this decision of the Kentucky Court is not in harmony with the views recently expressed here on the same question in *First National Bank v. California, supra*.

At any rate, the Kentucky case, of whatsoever weight on the question dealt with, has no bearing on the right of the state to maintain proceedings to restrain a national bank within the limits, or supposed limits, of its charter.

Reference is also made to *Missouri v. Holland*, 252 U. S. 416, where the state was permitted to maintain an action to test the validity of the Migratory Bird Treaty with Great Britain, and statutes enacted in its enforcement; but as said by Mr. Justice Holmes, speaking for the Court in that case, the state had a pecuniary interest "as owner of the wild birds within its borders" which is entirely absent here.

To paraphrase the inquiry propounded by the Court for reargument: Alike upon principle and upon precedent, a state is without power to institute proceedings to question compliance by a national bank with its charter powers; for the reason that (quoting the *Lockwood case, supra*) "*the right to institute such proceedings is inherently in the Government of the Nation.*"

II.

The Validity of the State Statute.

A state statute inhibits a banking institution to establish branches. It was enacted as a part of a statutory scheme for the incorporation of state banks, and the regulation of their activities. It seems a perversion of its obvious purpose to say that it was intended to apply to national banks, but the state court has so interpreted it, and, under familiar rules, that interpretation must be accepted here.

Wherefore, arises the inquiry: Is such a statute valid as applied to a national bank? Because we doubt not that, if the state has power to enact such a statute, it has plenary power to enforce it. A condition of sovereignty which will admit of the enactment, but not the enforcement, of legislation is anomalous to the degree of impossibility.

The same considerations which deny to the state the power to lay limitations upon the charter powers of national corporations through visitation in the courts would seem also to deny this power through legislation. Each is the exercise of sovereignty; the one no more than the other.

The argument here in behalf of the state is that since Congress has not legislated on the subject the state has the power to forbid it. The source of the power is sought in certain decisions of this Court,

affirming the power of the state to bind national banks in their dealings with the community, *by general legislation*. Reference is had to *National Bank v. Commonwealth*, 9 Wall. 353 (362); *Davis v. Elmira Savings Bank*, 161 U. S. 275 (283), and *McClellan v. Chipman*, 164 U. S. 347 (357), and the argument advanced that this statute neither conflicts with the act of Congress nor impairs the efficiency of the bank to perform its duties to the General Government—therefore it is valid. We believe it capable of demonstration that such legislation both conflicts with the act of Congress and may be so directed as to impair the efficiency of the bank to perform its duties to the General Government.

STATE LEGISLATION RESPECTING THE POWERS OF
NATIONAL BANKS IMPAIR THEIR EFFICIENCY.

The proposition is that a state may by statute deny a national bank the power to have branch offices; or, conversely, by statute, compel it to conduct its business activities within a single building. If such power exists, it will not cease to exist because of the extent of its exercise. If state legislation may restrain a national bank within four walls, it may likewise prescribe the cubic capacity of the structure, limit and restrict the number of employes, and otherwise so cripple the institution by inimical legislation as to render it of no avail as an instrumentality of the Gov-

ernment. If the state may so legislate respecting a national bank, then, as in effect pointed out in *Osborne v. United States Bank*, *supra*, its power to so restrain the Post Office Department, the Collector of Internal Revenue, or any other officer of the National Government, must likewise be conceded. And the validity of the legislation is so tested, not by its particular provisions, but by the *power* to enact it. The state legislation respecting national banks, which was held invalid in *McCulloch v. Maryland* and *Osborne v. Bank*, was not condemned because its provisions were onerous, but because of an entire lack of power to enact it—because (as said in *McCulloch's* case) the sovereignty of the state did not extend to the regulation of the business of national banks, without reference to the nature of the regulations prescribed.

THE CONGRESS HAVE DEFINED THE POWERS OF NATIONAL BANKS AND THEREBY EXCLUDED STATE LEGISLATION.

The Congress created this bank and defined its powers. Under the National Bank Act it either has or has not the power to have a branch office as it here attempts. If it has the power, it is because such has been (expressly or impliedly) conferred by the Congress. If it has it not, then by the same act of Congress it is forbidden to exercise it.

For every legislative grant of corporate power is a legislative exclusion of power not granted.

In *Thomas v. Railroad Company*, 101 U. S. 71 (82), Mr. Justice Miller said for the Court on this subject:

“We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that *the enumeration of these powers implies the exclusion of all others.*”

This language was quoted with approval in *Penn. Co. v. St. Louis etc. Railway Company*, 118 U. S. 291 (307), and in *Central Transportation Company v. Pullman's Car Company*, 139 U. S. 24 (43).

This rule has been applied to the statutes dealing with powers of national banks. Thus in *First National Bank v. National Exchange Bank*, 92 U. S. 122 (128), Mr. Chief Justice Waite, delivering the opinion, said:

“Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power.”

Therefore, when the Congress created this bank, and endowed it with certain powers, they by the same legislative act forbade it to exercise others. The whole legislative field, therefore, respecting the powers conferred has been occupied by the Congress, and there is no room for state legislation on the subject.

If the bank has asserted power the state cannot take it away. If the power does not exist under the Act of Congress the state cannot confer it by affirmative legislation. Legislation is the will of the sovereign enforced upon the citizen without his consent. It is the supreme expression of sovereignty. *State legislation which is only valid when expressed negatively, and not affirmatively, is not legislation at all.* State legislation, which is only valid when it conforms to the express or implied provisions of Acts of Congress dealing supremely with the same subject, is not sovereign legislation. Else, by echoing Acts of Congress relating to interstate commerce and other matters committed exclusively to the charge of the National Government, the state may take over the entire functions of that Government, through the guise of enforcing its own statutes.

THE DECISIONS ON THE SUBJECT.

It is not difficult to ascertain from the course of decision in this court what is intended by the ex-

pression that general state laws are valid in relation to national banks if they do not conflict with national legislation or impair the efficiency of the banks as agencies of the General Government. So far as we ascertain that expression was first made use of by Mr. Justice Miller in *National Bank v. Commonwealth*, 9 Wall. 353 (361). The case dealt with the validity of certain regulations prescribed by the state *in enforcing the power conferred by the Congress to tax shares of national banks*. The expressions were these:

“The most important agents of the Federal Government are its officers, but no one will contend that when a man becomes an officer of the Government he ceases to be subject to the laws of the state. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that Government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the states. The salary of a federal officer may not be taxed; he may be exempted from any personal service

which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the state for the shares of their capital stock, *when the law of the Federal Government authorizes the tax.*"

The principles to be deduced are that these banks, having been chartered to do business in the states, must perforce be subject in so doing to the *general laws* of the state in which they are situate, and that *taxing regulations enacted by the authority of the Congress must be deemed valid, unless they are so framed as to cripple the efficiency of the bank as an agency of the Federal Government.* This is the only

case in which the formula has been expressed *in the negative*, and the expressions of that opinion must be read in the light of the question under discussion.

In *Davis v. Elmira Savings Bank*, 161 U. S. 275 (283), Mr. Justice White expressed the same thought *in the affirmative*, i. e., *that state legislation respecting national banks is invalid if it conflicts with congressional action or impairs the efficiency of these agencies, with no suggestion that this definition comprehended all possible invalid legislation with respect to national banks.*

The same situation exists with respect to the expressions of the Court in *McClellan v. Chipman*, 164 U. S. 357, and in *First National Bank v. California*, Ms. Op. No. 276, October Term, 1922, where Mr. Justice McReynolds observed with respect to such institutions that *"their contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation."*

The principles declared in *Easton v. Iowa*, 188 U. S. 220, serve to further elucidate the character of legislation which the states may not enforce against national banks.

With respect to the purpose of the National Bank

Act, Mr. Justice Shiras, speaking for the Court, said (l. c. 229) :

“That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states.”

As to which it is to be observed that recognition of the validity of the state statute here under consideration is to hold that national banks are not “independent, so far as powers are concerned, of state legislation,” contrary to the express declarations of that opinion.

In *Farmers' Bank v. Dearing*, 91 U. S. 29 (34), Mr. Justice Swayne observed that national banks were agencies designed by the National Government to accomplish its ends, and then said:

“Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is ‘an abuse, because it is the usurpation of power which a single state cannot give.’ ”

This language was quoted as declaring the correct principle applicable in *Easton's case* (188 U. S. 237).

In the course of the opinion in the latter case the utterances of the Pennsylvania Court on the same question were quoted with approval thus (188 U. S. 233):

“In *Allen's Appeal*, 119 Pa. St. 192, the question was whether a state law, which forbade ‘any cashier of any bank from engaging, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation or calling other than his duty as cashier,’ and which declared the same to be a misdemeanor, was applicable to the cashier of a national bank, and it was held that it was not so applicable, the Court saying, among other things:

“‘The National Banking Act and its supplements create a complete system for the government of those institutions. *Conceding the power of Congress to create this system, we are unable to see how it can be regulated or interfered with by state legislation.* The Act of 1860, if applied to national banks, imposes a disqualification upon cashiers of such institutions where none has been imposed by act of Congress. If the state may impose one qualification upon the cashiers, why not another? If upon cashier, why not upon the president or other officer? Nay, further, suppose the Legislature should declare that no person should be a bank director unless he has arrived at fifty years of age, or should be the owner of one hundred shares of stock, could we apply such an act to national banks? If so, such institutions would have a precarious existence. They would

be liable to be interfered with at every step, and it might not be long before the whole national banking system would have to be thrown aside as so much worthless lumber.' ”

In the light of these utterances the fundamental soundness of which cannot be questioned, and which were reviewed, and quoted as in part the basis for the judgment in *First National Bank v. California*, *supra*, it must be held that any attempt by a state to define or limit the corporate powers of a national bank is void as an invasion of a field which pertains exclusively to another sovereignty.

CONGRESS HAVE PROMULGATED ALL REGULATIONS
INTENDED TO BE OPERATIVE.

And, indeed, upon correct principles, *any* legislation by a state with respect to the powers and functions of national banks necessarily conflicts with Congressional regulations on the same subject. For the Congress, in defining the powers of these institutions, must be assumed to have promulgated all the regulations intended to be operative. It is not permissible for the state to fill any assumed *hiatus* in these, either negatively or affirmatively. This is demonstrated by these observations in *Easton v. Iowa*, 188 U. S. 236:

“A leading case in which this Court had occasion to consider the limitation of legislation by a

state affecting a subject within the scope of action by Congress is that of *Prigg v. Pennsylvania*, 16 Pet. 539, from which we quote the following observations:

“*If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.*”

In *California Bank v. Kennedy*, 167 U. S. 362 (365), it was held that powers of a national bank are controlled only by national legislation.

Mr. Justice White, delivering the opinion, said:

“Before discussing the merits we will briefly consider and dispose of a suggestion that no federal question appears by the record to have been properly raised below, and, therefore, there is a want of jurisdiction in this Court to review the judgment. The answer averred that if any stock of the savings bank appeared to have been issued

to the national bank, it was 'issued without authority of this corporation defendant, and without authority of law.' *In view of the fact that the defendant was a national bank, deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct of the corporation; that is, the law of the United States.*"

WHEN A STATE STATUTE CONFLICTS WITH
CONGRESSIONAL ACTION.

The expression that 'a state statute relating to a national bank is void if it conflicts with the act of Congress must be held, in the light of the decisions of this Court, to be of broader significance than a mere *express conflict in provisions*. It is by no means limited to those instances where the act of Congress provides one thing and the state statute the converse.

Witness *Farmers etc. National Bank v. Dearing*, 91 U. S. 29, where the Act of Congress prescribed the loss of interest for usury, while the state statute also provided for the loss of the debt. There was no express conflict in the two statutes. Both might well have been enforced, if both had been valid. But Congress, having dealt with the subject, it was held that the state could not do so.

Witness, also, *Easton v. Iowa*, 188 U. S. 220, where Congress had dealt with the insolvency of national banks, and the disposition of their assets, but had not dealt with the matter of accepting deposits while insolvent, as a crime of an officer of such a bank. Nevertheless, a state statute dealing therewith was held void.

Witness, also, *First National Bank v. California*, Ms. Op. No. 276, October Term, 1922 (June 4, 1923). Congress had not expressly dealt with the disposition of unclaimed deposits in national banks, but the power of the state to do so was denied.

The rule deducible is that Congress, having legislated concerning the powers and internal management of national banks, have presumably so declared all regulations desired; and no state statute can enter that field without encountering either what the Congress have expressly or impliedly said, or what they determined not to say.

VISITORIAL STATE STATUTES FORBIDDEN BY THE
NATIONAL BANK ACT.

Not only is the state statute here under consideration invalid, upon the principles declared by this Court, but it seems to us to have been expressly forbidden by the Congress.

In *Guthrie v. Harkness*, 199 U. S. 157, as heretofore quoted, it was declared that corporate visitation is,

in part, at least, a legislative function. In the light of that opinion we understand the term to embrace both legislative regulations and the enforcement thereof by the sovereign. That it does include the former is the express declaration in that case.

The National Bank Act provides methods of incorporation, corporate powers, duties, functions and restrictions, and various methods of control in behalf of the United States.

Having so provided, the act further declares (R. S., Sec. 5241):

“No association shall be subject to any visitatorial powers other than such as are authorized by this title, or are vested in the courts of justice.”

By the Act of December 23, 1913 (38 St. L., Part 1, 272 Ch. 6, Sec. 21), this further provision was enacted:

“No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice, or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.”

The result is that the Congress have expressly excluded the law-making power of the states from the enactment of visitatorial statutes with respect to na-

tional banks. So that, if the power otherwise existed, it has been denied by the National Legislature. It is believed, however, that the principles declared in the decisions of this Court, herein cited, demonstrate the invalidity of state statutes defining or limiting the corporate powers of national banking associations.

III.

The Powers of the Bank.

THE SCOPE OF THE INQUIRY.

In dealing with this question it is well to keep in mind precisely what this bank is charged with having done. It is said in the information (Rec., pp. 1-3) that the bank was incorporated under the National Bank Act to conduct a banking business in the City of St. Louis; that for a number of years it had its banking house at a named corner therein; that latterly it had established "several blocks" removed from this corner a branch bank, wherein it was also conducting its banking business; and that it proposed to establish other similar places at other points in the city for the same purpose.

The term "branch bank" or branch office of a banking institution is not an expression of certain significance. It may denote practically a separate institution, with its own separate capitalization and manage-

ment, and located remote from the parent institution. No such is charged here.

In its ultimate analysis the head and front of offending of the plaintiff in error is that through the same management and under the control of the same directorate it has attempted to establish contact with its customers and meet their banking demands at more than one point in the City of St. Louis. As it is not an eleemosynary institution, it is highly probable that economic conditions in that community make it desirable that it so conduct its business in the opinion of those responsible for its welfare. The inquiry is: Has it the power under the National Bank Act to so do?

Having in mind what is charged, it is manifest, we believe, that the real inquiry is whether or not a national bank must conduct all its activities under *one roof*. The adverse contention, we also believe, resolves itself into the claim that, while a national bank may expand perpendicularly *ad libitum*, it *may not expand horizontally without occupancy of all the intervening space*.

If such is found to be the intent of the Congress, it must be obeyed, of course, but we do not believe any such restricted interpretation of the act is called for by its terms, nor by any probable purpose of the Congress in its enactment.

BANKING NOT A PRIVILEGE.

While the business of banking is of a nature to make it proper that it be regulated by the Legislature, it is, nevertheless, not a privilege, but a natural right.

Said Mr. Chief Justice Taney, speaking for the Court, in *Bank of Augusta v. Earle*, 13 Pet. 517, 595:

“The institutions of Alabama, like those of the other states, are founded upon the great principles of the common law; and it is very clear that, at common law, the right of banking in all of its ramifications belonged to individual citizens, and might be exercised by them at their pleasure. * * * Undoubtedly, the sovereign authority may regulate and restrain this right.”

The Supreme Court of California, in *Bank of California v. San Francisco*, 142 Cal. 276, 279, said:

“Admittedly, the mere right to do a banking business is not a franchise, in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or dry goods business is available to all citizens, and no grant from the sovereign is essential to its existence. Any individual or any number of individuals may, under such regulations as the state in the exercise of its police powers may legally make, engage therein, without any grant from the state.” * * *

And in *Curtiss v. Leavitt*, 15 N. Y. 9, 52, the Court of Appeals of New York said:

“Banking is not in its nature a corporate franchise. In the absence of legislative restraint, it may be carried on by individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc.”

CORPORATE FRANCHISES NOT IMPLIEDLY RESTRICTED AS TO PLACE.

In the absence of legislative inhibition, the grant of a corporate franchise may be exercised anywhere within the geographical limits of the sovereignty which confers the franchise.

“If,” says Mr. Fletcher, “there are no express or implied restrictions in its charter, a corporation may locate and carry on its business at any place within the state” (*Fletcher on Corporations*, Vol. 2, Ch. 21, Sec. 806, citing *City Bank v. Beach*, 1 Blatch. [U. S.] 425; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149; *Stickle v. Liberty Cycle Co.*, 32 Atl. 708).

In *Loyd’s Executorial Trustees v. Lynchburg*, 113 Va. 627, it is said:

“Independent of statute, it is not essential to the existence of a corporation that its principal office shall be fixed, or, indeed, that it shall have a principal office; * * *.”

Quite generally, in the United States, corporations are no longer formed by direct legislative action, but by act of the parties under general laws. These usually require that the articles of association shall designate the place of business or the principal place of business. This, for obvious visitorial and other governmental purposes. But, by common consent, these are not taken as limiting the business activities of the corporation to the place designated. It is universally recognized that corporations so created may establish themselves in other localities as well, and there pursue, unhindered, the entire corporate function with which they have been vested.

Wherefore, and inasmuch as the business of banking is not a privilege, but a natural right, except as regulated by the Legislature, a banking corporation is no more inherently restricted as to locality than any other corporation whatsoever—this is to say, in the absence of legislative inhibition, a banking corporation may conduct its corporate activities anywhere within the geographical boundaries of the sovereign which gave it being, as freely as may any other corporation formed for any other purpose. This power of a corporation to conduct its activities in places other than that designated in its charter as the (corporate) place of business is, by common consent, one of the implied or incidental powers following upon the express grant.

INCIDENTAL POWERS OF NATIONAL BANKS.

The National Bank Act, it will be noticed, expressly confers on such banks such incidental powers as are necessary to carry on the business (R. S. Sec. 5136, Sub. Seventh).

In *First National Bank v. National Exchange Bank*, 92 U. S. 122 (126), where Mr. Justice Waite, speaking for the Court, said respecting the powers of national banks:

“Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. * * * Banks may do, in this behalf, whatever natural persons could do under like circumstances.”

In *Green Bay etc. R. R. Co. v. Union etc. Co.*, 107 U. S. 98 (100), Mr. Justice Gray observed:

“But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited (*Thomas v. Railroad Co.*, 101 U. S. 71; *Attorney-General v. Great Eastern Railway Co.*, 5 App. Cas. 473; *Davis v. Old Colony Railroad Co.*, 131 Mass. 258).”

The power here under inquiry would certainly be among the ordinary, incidental powers of an ordinary corporation.

Accordingly, it must be held that this bank possesses the power which it has attempted to exercise, unless the Congress have forbidden its exercise.

THE PROVISIONS OF THE NATIONAL BANK ACT.

The National Banking Act, after providing that banks may be formed by five or more persons entering into articles of association, which shall specify in general terms the object of its formation (R. S. Sec. 5133), then provides (R. S. Sec. 5136) that the organization certificate shall specifically state:

“The place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village.”

This being done, the act then provides that the bank shall have power to regulate by by-laws “how its general business (shall be) conducted and the privileges granted it by law exercised and enjoyed,” and “to exercise * * * all such incidental powers as shall be necessary to carry on the business of banking,” etc.

The plaintiff in error complied with these requirements, designating the City of St. Louis as “the place

where its operations of discount and deposit were to be carried on" (Rec., p. 1).

The word "place" as used in R. S. Sec. 5190, quoted above, does not mean the location within the "county, city, town or village," but means the county, city, town or village within which the operations of the bank are to be carried on.

This is not only the necessary effect of the language used, but is also the judicial construction given thereto.

This Court had occasion to consider the meaning of the words "the place" as used in section 5136 and section 5190, in *McCormick v. Market National Bank*, 165 U. S. 538 (549), where Mr. Justice Gray, delivering the opinion of the Court, said:

"The provision of section 5190 that 'the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate' refers to its 'usual business' after obtaining its certificate from the comptroller; and to 'the place,' that is, the city or town in which, after it has been authorized by the comptroller's certificate to commence its business of banking, its office or banking house is located."

Like construction was given to these words by the Supreme Court of Illinois (*McCormick v. Market*

National Bank, 162 Ill. 100, l. c. 108), where that Court said:

“The association is required, in its organization, to state the place where its operations of discount and deposits are to be carried on, but by this is meant the town or city, not the room, street or number in such town or city.”

The provisions of R. S. Sec. 5136, that a bank must, in its organization certificate, designate the city, town or village within which it proposes to do business; of R. S. Sec. 5190, that its place of business must be located therein; and of Act of May 1, 1886 (24 St. L. Ch. 73), that it may remove to some other city on authority from the Comptroller, seem to clearly indicate an intention on the part of the Congress to limit the business activities of such institutions to the place designated in the organization certificate.

But since the “place” so designated has sole reference to the city mentioned in the organization certificate, and since the plaintiff in error is not charged with engaging in banking outside the City of St. Louis, it is apparent that the position of the Attorney-General cannot be sustained unless the Congress shall be found to have restrained the bank as to its place of business *within* the city, town or village designated in the certificate.

INTERPRETATION OF R. S. SEC. 5136.

If such restraint exists, it is to be found in Revised Statutes, Sec. 5190, which provides:

“The usual business of each national bank shall be transacted at an office or banking house located in the place specified in its organization certificate.”

It is upon the provisions of this section that the Attorney-General of the state rests his contention, and the state court its conclusion, that the Congress have forbidden national banks to establish branch offices for the transaction of a banking business within the respective cities in which they do business.

This Court, so far as our investigations bring to light, has had occasion to consider this statute on only one occasion, viz., in *Merchants National Bank v. State National Bank*, 10 Wall. 604 (651). In that case it was ruled that the act of a cashier of a national bank in certifying a check away from the banking house was valid—Mr. Justice Swayne, who spoke for the Court, saying that the provisions of the act with respect to the place of business of the bank “must be construed reasonably.”

Having in mind that the words “the place” mean the territorial area within which the bank is authorized to do its business, and not a designated lot

or building located in such area, the question arising under section 5134 is this:

Is that section a *limitation* or a *command*?

Does that section place a limitation upon the manner or method or the number of offices in which the granted charter powers shall be exercised, or does it command that they shall be exercised in a place of business, *i. e.*, an established office or banking house as contradistinguished from a peripatetic banking business?

The natural reading and the manifest purpose of R. S. Sec. 5190 is that the bank shall have "an office or banking house" located in the "place" in the city, town or village designated in its organization certificate—not that it shall have "but an office" or "only one office." These, or those of like import, would have been the chosen words if limitation had been the legislative purpose.

The statute commands that the bank shall maintain an office or banking house.

The purpose of the command is that there shall be at least one place of business where those who want to transact business with it may do so—where the State's Attorney-General, as he saw fit to do in this case, may serve it with process—where the Attorney-General of the United States, if he saw fit, as he did not see fit in this case, may do likewise—where any one who has business with the bank may seek it out

and transact that business—that it shall exercise the granted powers at a place of business (office or banking house) and not upon the sidewalks or in the streets.

The statute is little more than the familiar statute, common to most, if not all the states, concerning both foreign and domestic corporations that they shall, in the place where organized, maintain at least one known place of business.

It is a command that it shall have an office, but not an inhibition against its having more than one.

If the Congress had intended that a national bank should confine its business activities to one building or one room, they would have chosen language capable of plainly conveying that idea.

The fact is that the Congress were doing no more than dealing with the bank as an institution, as an agency of the Government of the United States, and *not at all with the physical characteristics, or juxtaposition of the structure or structures which, taken together, might, from time to time, constitute its banking house.* And, under the correct interpretation of the act, the entire premises in which it transacts a banking business (within the city of its choice) comprise its “office or banking house” within the meaning of this section. And that is true whether these be all under one roof, or part under this roof

and part under the other—part in this square and part in the next.

The act was not passed for a day or a year. The original period of corporate life was twenty years (R. S. Sec. 5136, Sub. Second). Renewal privileges were subsequently added (Act July 2, 1882, 22 St. L. 162, Ch. 290). To say that the Congress, in providing a permanent national banking system to grow with the country, at the same time intended that the business of these institutions, no matter what the exigency, should always be in *physical* contact, *instead of merely maintaining economic supervisory contact*, is to argue that the Congress were building up with one hand and destroying with the other.

In one of the large cities of the United States a national bank has its contact with the community on the ground floor of a building, while its accounting department and directors' rooms are many floors above, the intervening space not being under its control. So far as proximity is concerned, the latter might as well be located "several blocks away" (to quote the information in this case). If the Act of Congress means what the State here contends, that institution is violating its provisions. And yet probably none would so contend.

It is also to be noted that R. S. Sec. 5190, if interpreted as dealing with the physical structure and contiguity of the place of business of a national bank,

contains no exceptions. If, as the state contends, the business of the bank must be limited to one office, then it is *all* so limited. And yet, so interpreted, *probably every national bank in every large city in the United States is daily engaged in violating it. For, in every such city the banks are, and have been for years, organized into a clearing house, with separate offices and paid officials, where the very important banking business of paying checks and receiving payment of checks is daily transacted by all of them.* And yet, if a national bank may not *alone* have a branch office for part of its business, several of them may not *jointly do so.*

Those offices, buildings and structures which the bank occupies for the transaction of its banking business, whether united physically, or only by the unity of use, constitute its office or banking house within the true intent and meaning of this statute; just as the offices and various structures of a manufacturing industry constitute its plant or works, whether in a single building or separated by walls, by intervening space, or by other buildings. *It was the singleness of use, and not details of bricks and mortar, with which the Congress were dealing.* The bank was to have a known place of business for various and obvious reasons; but whether to be composed of a single structure or more than one, and the relation of the component parts to the whole in

proximity (within the designated city) was left to the board of directors, to be solved by the exigencies of the situation from time to time, with due regard to the proper growth of the business of the bank.

The conclusion that this bank has been denied power to do that which it here seeks to do can only be arrived at by an alteration of the language used by the Congress. The provision of R. S. Sec. 5190 is that "the usual business of each national bank shall be transacted at an office or banking house located," etc. If the plaintiff in error transacts a portion of its usual business at its main banking house and another at a branch office "several blocks away" (as charged), by what process of ratiocination can the conclusion be arrived at that it is transacting any part of its business other than "*at an office or banking house located in the place specified in its location certificate?*"

Which serves to point the fundamental distinction between this statute, as framed by the national legislature, and a statute requiring that the business of the bank be transacted at a single banking house, or carrying words of similar import. This enactment cannot be so read without doing violence to the language employed in its enactment. For *the indefinite article "a" or "an" is not ordinarily a word of limitation.*

In the Century Dictionary, in definition of the article "a" or "an," it is said:

"Usually, as the indefinite article proper, it points out, in a loose way, as one of a class containing more of the same kind."

In *United States v. Oregon etc. Ry. Co.*, 164 U. S. 526, Mr. Chief Justice Fuller, speaking for the Court, said:

"The general rule is that 'words importing the singular number may extend to and be applied to several persons or things; words importing the plural number may include the singular,' as provided in U. S. Rev. Stats., Sec. 1."

In *United States v. Perry*, 133 Fed. 841, on the principle that the article "a" may be interpreted to include more than one, the Board of General Appraisers and Judge Hazel, of the Southern District of New York, united in the view that a certain duty prescribed upon a statue cut from "a solid block of marble" was applicable to such a creation cut from several solid blocks of marble and combined.

In *National Union Bank v. Copeland*, 171 Mass. 257, it is said:

"The article 'a' is not necessarily a singular term. It is often used in the sense of 'any' and is then applied to more than one individual object."

A provision of the Constitution of Arkansas, providing for the election of "a" judge in each judicial circuit, was held not to inhibit the General Assembly from providing for the election of more than one judge in the same circuit. The Court said (*State ex rel. v. Martin*, 60 Ark. 334):

"Now, the adjective 'a,' commonly called the 'indefinite article,' and so called, too, because it does not define any particular person or thing, *is entirely too indefinite*, in the connection used, *to define or limit the number of judges* which the legislative wisdom may provide for the judicial circuits of the state. * * * According to Mr. Webster, 'a' means 'one' or 'any,' but less 'emphatically than either.' It may mean one where only one is intended. That is the trouble. *Of itself it is in no sense a word of limitation.* * * * The Constitution requires 'a judge' for each circuit, and there must be at least one judge. But where is the limitation upon the Legislature to provide for more if the necessity arises? * * *,"

In *Commonwealth v. Wetzel*, 2 S. W. Rep. 125, the provisions of a Kentucky statute conferring powers upon "a judge" was held by the Court of Appeals of that state to be equivalent to *any judge*.

There are, of course, instances where the circumstances or the context of a statute may require that the indefinite article be read as the equivalent of the

word *one*, and hence to function as a limitation. Nothing in the context of this statute so requires. Having in mind that the statute is to have a reasonable interpretation (*National Bank v. State National Bank*, 10 Wall. 604), the statute seems to us to be a command rather than a limitation, and the substitution of the word "one" for the word "an" by construction is not justified.

The Congress, in our opinion, meant no more than that the bank should be located, rather than peripatetic—that its business should be so conducted that all might know *where* it was being done, to the end that those interested might know *how* it was being done; that records might be kept of its transactions, available alike to its directors, its stockholders and the representatives of the Government, its master. It seems wellnigh inconceivable that in creating a system, national in scope, and evidently intended as a permanent part of the economics of the country, the Congress would undertake to confine their activities beneath one roof, or to contiguous quarters, under any and all circumstances, and no matter how this might serve to hamper their legitimate transactions by reason of local conditions, rendering it impossible to secure at once adequate and contiguous quarters. And it is to this contention that the contrary argument comes when reduced to its essentials.

The history of banking at large furnishes no reason to suppose the Congress to have been opposed to national banks having a place of business at more than one point in the place in which they are located, if physical surroundings, economic advantage, or the legitimate pursuit of business seem to the board of directors to require such a course.

The greatest banking nation of the world has always encouraged branch banking in a much more extended form than it is here in question (*i. e.*, the extension of activity beyond the city in which the bank is located). The Dominion of Canada, to our north, pursues the same policy.

There is no settled policy on the subject in the states of the Union. In some, branches are permitted in the city where the bank is located; in others, the broader policy prevails of permitting them throughout the state; in others, branches are prohibited.

(Note: For the collation of detailed information on this subject we are indebted to the excellent brief of John A. Garver as *Amicus Curiae*, q. v., p. 5.)

Nor is there any necessity of hampering the national banks of the country in their legitimate growth by an iconoclastic construction of this statute. They were designed to aid the Government in an important function; they cannot do this unless they prosper; they cannot prosper unless they are permitted legitimate growth. They suffer not at all in comparison

with any state institutions in the matter of safeguarding the funds of the community and meeting their obligations to those who patronize them.

Dealt with, according to its terms, as well as in the light of the probable reason for its enactment, and R. S. Sec. 5190, while limiting (by implication) the business of national banks to the place (*i. e.*, the city, town or village) designated in its organization certificate, was not designed or intended to prescribe physical contact for the office or place of business of such, nor to limit them to a single place of business within the geographical limits prescribed.

DEPARTMENTAL CONSTRUCTION.

It is urged that there has been a departmental construction of R. S. Sec. 5190 to the contrary of that for which we here contend, and such as to require, under prior decisions of this Court, that that construction be adopted.

The statute is a part of the National Bank Act as re-enacted and revised June 3, ¹⁸⁶⁴~~1863~~ (13 St. L. 102, Ch. 106, Sec. 8). So far as appears, its interpretation does not seem to have arrested attention until August of 1889, when Solicitor Hepburn of the Treasury Department appears to have interpreted the statute as intending that a national bank should have *but one* office in the city designated in its

charter. The occasion for this consideration of the question does not appear.

In 1911 a national bank in Atlanta inquired of the Comptroller whether objection would be made to the establishment by it of a branch bank in that city. The Secretary of the Treasury asked the opinion of the Department of Justice. Mr. Brown, special assistant to the Attorney-General, wrote an opinion in which he arrived at the conclusion that the power existed; Mr. Assistant Attorney-General Fowler arrived at the contrary conclusion. The Attorney-General approved of the latter opinion (29 Op. Atty.-Genl. 81). This opinion recognized that it was a doubtful question and one for the courts to determine; and further that the Comptroller of the Currency was vested with no control or discretion with respect to such a function, if such existed—*i. e.*, that the bank either had the right or did not have it, according as the statute was interpreted, and the Treasury Department could neither confer it nor take it away by departmental action.

In 1920, in Instructions as to Organization of National Banks, issued by the Comptroller (p. 110, chapter 9), the department apparently accepted this opinion of the Attorney-General as correctly defining the powers of national banks.

But, *at this time*, the department has adopted the contrary construction. The Comptroller is sanction-

ing the establishment of branch offices by national banks in the cities of their location, when necessary to keep them in a state of proper competition with state institutions enjoying similar privileges (1922 Supp. to Pratt's Digest of the Laws of Banking, p. 7).

Quoting the excellent brief of Mr. John Quinn, *amicus curiae*, as to information gleaned by him from the records of the Comptroller's office:

"The extent to which national banks in recent years have been brought into competition with state banks and branches of state banks in many of the large cities of the United States is shown by the following compilation made in the office of the Comptroller of the Currency:

"In Detroit, Michigan, there are three national banks and one branch office. The three national banks are in close proximity to each other in the downtown business section. In competition with those three national banks are fourteen state banks which have 189 state bank branches. To this number should be added eleven state banks in suburbs of Detroit. Those eleven state banks in the suburbs have ten branches.

"In the District of Columbia fourteen national banks have seven branch offices. Thirty-six non-national banks have eight branch offices.

"In Cincinnati there are twenty-two national banks with no branches. There are thirty-eight state banks with thirty branches.

“In Columbus there are seven national banks with no branches. There are seven state banks, one of which has seven branches.

“In Cleveland there are three national banks with two national bank branch offices. There are eighteen state banks with a total of seventy-five state bank branches.

“In New Orleans there is one national bank with no branch office. There are six state banks with thirty-eight branch offices.

“In Atlanta there are three national banks with six branches. There are thirteen state banks, one of which has four branches.

“In Nashville there are five national banks with no branches. There are nine state banks with seven branches.

“In Richmond there are six national banks, one of which has four branch offices. There are twenty-three state banks with eight branches.

“In Baltimore there are twelve national banks, one of which has two branch offices. There are forty-six state banks with twenty-one branches.

“In Buffalo there are four national banks, one of which has a branch office. There are twelve state banks with forty branches.

“In Oakland, California, there are three national banks with no branch offices. There are seven state banks with thirty state bank branches.

“In Boston there are thirteen national banks with one branch office. There are twenty state banks with twenty-three branches.

“In San Francisco there are seven national banks with no branch offices. There are eighteen

state banks with forty-three state bank branches.

“In Los Angeles there are twenty-four national banks and six national bank branch offices. There are twenty-five state banks with one hundred and eight state bank branches.

“In the City of New York there are thirty-two national banks with forty-three branches. There are nineteen state banks with one hundred and thirty-nine branches. There are twenty trust companies with sixty branches. It will thus be seen that as against the forty-three branches of national banks there are one hundred and ninety-nine branches of state banks and trust companies in competition therewith.”

It is, of course, manifest that R. S. Sec. 5190 cannot mean one thing in Missouri and another in New York; and that if, under the law of its being, *one* national bank in the United States possesses power to establish branch offices in the city of its residence to better serve its customers and meet competition, then *all* such have like power.

It is upon such facts that it must be determined whether there has been such a departmental construction of this statute as precludes this Court giving it the meaning which flows from the natural significance of the language employed in its enactment. Consideration of the fundamentals upon which the doctrine of departmental construction rests fairly answers this inquiry in the negative.

In *Studebaker v. Perry*, 184 U. S. 259 (269), Mr. Justice Shiras, writing the opinion, expressed a limitation on the doctrine thus:

“The doctrine invoked is a useful one, but its application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance.”

There is, of course, here no such situation. No rights have accrued under the opinion of the Attorney-General which will in anywise be disturbed by a different interpretation of the statute, if the Court does not agree with his opinion. It is said in the printed brief of the learned Attorney-General of the state that the state, in the adoption of its own statute, has been influenced by the alleged policy of the National Government. The suggestion is gratuitous and probably not well founded. It certainly creates no *noblesse oblige* upon the National Government. The state statute might be changed while this case is receiving deliberation.

In *United States v. Pugh*, 99 U. S. 265 (269), Mr. Chief Justice Waite, speaking for the Court, remarked:

“It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the

contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

The essential elements of the doctrine were thus summed up by Mr. Justice Blatchford, for the Court, in *United States v. Hahn*, 107 U. S. 402 (406), where, in affirmance of the opinion of the Court of Claims, he said:

"The Court added that such construction did not appear to it unreasonable, and might well have been reached in the exercise of a sound judgment, and that, regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation sanctioned by this Court in *United States v. Pugh*, 99 U. S. 265, that, 'in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect (*Edwards' Lessee v. Darby*, 12 Wheat. 210),' and where this Court refused to interfere with such construction after it had been acted upon for a long time."

In *Swift & Co. v. United States*, 105 U. S. 691 (695), Mr. Justice Matthews said:

"The rule which gives determining weight to contemporaneous construction, put upon a statute by those charged with its execution, applies only in cases of ambiguity and doubt."

To the same effect is *United States v. Graham*, 110 U. S. 219, and other cases there cited.

In *Merritt v. Cameron*, 137 U. S. 542 (551), Mr. Justice Lamar, speaking for the Court, said:

“A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons.”

In *United States v. Healey*, 160 U. S. 136 (145), it was held that where the practice of the department

charged with the administration of the law had not been uniform, the statute must be interpreted without reference to departmental practice.

In *Louisville & Nashville Railway Company v. Kentucky*, 161 U. S. 677 (690), it was held that mere inaction by a department could not be treated as "contemporaneous construction."

In *Wisconsin Central Railway Company v. United States*, 164 U. S. 190 (205), departmental construction was denied influence because it had been "neither contemporaneous nor continuous."

From these utterances and others of similar import it seems not difficult to deduce the true rule on this subject.

Apart from those instances where private rights have been acquired under the departmental construction (which is not the case here), such departmental construction is allowed to have weight only when the following conditions co-exist: (a) The departmental interpretation must have been contemporaneous with the enactment of the statute; (b) it must have been long continued; (c) it must have been uniform; (d) it must have been by the officer or department charged with the duty of executing the statute, and (e) the statute must be couched in ambiguous language. It is respectfully insisted that none of these elements are to be here found.

(a) The statute was enacted in 1864. No question appears to have arisen in the Treasury Department until 1889. All that occurred then was an opinion of the Solicitor of the department. The occasion for that inquiry does not appear. A quarter of a century intervened between the enactment of the statute and the concern of the Treasury Department as to its true meaning; and the opinion of the Attorney-General was not sought until 1911—twenty-two years later. The construction was not contemporaneous.

(b) There has been no long-continued interpretation of the act by any department, or in any manner. In 1889 the Solicitor of the Treasury expressed his views concerning the true meaning of the act; in 1911 the Attorney-General did likewise; in 1920 the Comptroller of the Currency promulgated the views of the Attorney-General; and in 1922 he made rulings and gave sanctions to a different interpretation, which has been acted on by numerous national banks.

(c) There has been no uniformity in the departmental interpretation. In 1911, on application by a bank for sanction of the institution of a branch office, the department (we assume) denied it, on the faith of the opinion of the Attorney-General; in 1922 the department gave sanction to numerous such applications. Not only that, but special counsel for the State in this proceeding stated at the bar of the state

court that they had brought the actions of this plaintiff in error here complained of to the attention of the Comptroller of the Currency, and of the Attorney-General of the United States, and they had each declined to interfere.

(d) This is not such a statute as will admit of the application of the rule of departmental construction. Many statutes require administrative duties on the part of officials and departments in their execution. It is the manner in which the statute is thus administered "by officers charged" with its execution which, under proper conditions, is permitted to become a part of the statute and control its interpretation. It is official *acts*, not *words*, to which the rule looks.

Those organizing a national bank must designate the city, town or village in which they would do business (R. S. Sec. 5134) and procure the approval of the Comptroller of the plan (R. S. Secs. 5168, 5169). If the bank afterwards desires to remove to some other city, his approval must also be had (Act of May 1, 1886, 24 St. L. 18, Ch. 73).

But, within the designated city, town or village, the selection of the place of business of the bank is solely the function of its board of directors. The Comptroller takes neither power nor duty in that respect. If it must do business under a single roof, it is because it is so restricted by the Congress, and

the Comptroller can neither enlarge the restriction nor relieve of it. If it is not so restricted by the act, the Comptroller cannot provide such. Therefore, the statute is not one for the application of this rule, because no administrative acts are possible, under its terms, in the sense that administrative acts may, under some circumstances, become a part of and control the interpretation of statutes which require affirmative acts of administration.

LEGISLATIVE INTERPRETATION.

It is also contended that the Congress have construed the statute contrary to the views herein expressed.

Reference is made in this connection to R. S. Sec. 5155 (Act of March 3, 1865, 13 St. L. 484, C. 78, Sec. 7), providing for the nationalization of state banks. It is argued that, because this statute authorizes state banks to become national banks, and retain any branches they may have been operating under the state law, the Congress which enacted the authorization were of opinion that the National Bank Act denied this power to corporations organized under its provisions.

But the terms of this statute are such as to negative any such conclusion. In the first place, it manifestly dealt with branch banking in the sense that it is practiced abroad, *i. e.*, wellnigh independent in-

stitutions, with separate capitalization and separate (but subordinate) management and control.

The authorization is that state banks may become nationalized and retain branches, "*the capital being joint and assigned to and used by the mother bank and branches in definite proportions.*" Without knowing the circumstances, the specific terms of this statute seem to indicate that it was passed with respect to the particular situation of a particular state institution or institutions. The war was on; the exigency was great. To induce state banks to come into the national institution was a matter of moment. The statute may have been enacted *quia timet*. It certainly confers powers, in this respect, which no one contends are to be found in the National Banking Act. We have noticed the wellnigh independent branches which the act authorizes state institutions to bring into the national system. No one contends that such a power subsists under the National Bank Act. The statute may have been enacted for this reason.

Other considerations should also be noted. In terms of this statute a state bank located, say, in San Francisco, with numerous branches located down-state, having separate management (under the same board of directors) and with the capital assigned in definite proportions to the mother bank and the branches, is authorized to come into the national system and continue its operations as theretofore.

As a result of the combined terms of R. S. Secs. 5134 and 5190, a bank organized under the act must designate the city, town or village in which it will do business, and must remain therein. The statute under consideration may have been enacted for that reason; and because state banks operating branches outside their respective home towns, either desired, or were desired, to become nationalized. R. S. Sec. 5155, therefore, confers powers upon state banks entering the national system plainly withheld by the National Bank Act from the institutions organized thereunder. And this is true without supposing that the Congress, in the enactment of R. S. Sec. 5190, intended to restrict the banks, organized under the act, to a single building, or to deal with the physical structure of the place of business they were required to maintain.

In other words, R. S. Sec. 5155 may well be accounted for without supposing that that Congress believed its predecessor to have intended to hamper the national banks, proper, by unreasonable and unnecessary restrictions in the conduct of their affairs.

Reference is also made to the Act of May 12, 1892 (27 St. L. 33, Ch. 71), authorizing the officials of the World's Columbian Exposition to designate a Chicago national bank to operate a branch bank on the exposition grounds during the period of the continuation thereof; also to the similar Act of March 3, 1901

(31 St. L. 1444, Ch. 86 Sec. 21), dealing with the same subject with respect to the Louisiana Purchase Exposition, to be shortly held at St. Louis.

But neither of these statutes convey any certain intimation as to the belief of the Congress as to the proper interpretation of prior enactments. They each were passed, more to deal with the powers of the Commissioners for these two expositions in the matter of selecting financial agencies than to give expression to the views of the Congress as to powers of national banks under the Act of 1863-1864. In the case of the St. Louis Exposition this is made plain by the language of the act as a whole, providing the Commission and defining its duties, of which this statute is a component part.

The Act of May 12, 1892, relating to the Chicago Fair, was quite as visibly in amendment of the act of the preceding Congress creating the Commission and defining its powers (26 St. L. 62, Ch. 156). Each of these statutes dealt not with the powers of national banks under their charters, but with the powers of the Commissioners of these two expositions, with respect to banking privileges to be exercised on the grounds. In the case of St. Louis, at least, this is made manifest by the language of the enactment, which authorizes the Commissioners to confer the privilege *upon any national bank or state bank or*

trust company located anywhere in the State of Missouri.

These statutes furnish no aid in arriving at the true interpretation of R. S. Sec. 5190.

Though not referred to by the learned Attorney-General, mention may be made also of the Act of April 26, 1922, dealing with branch banks in the District of Columbia. The official statutes not being yet available (to us, at least), we quote this enactment thus:

“That no corporation that is not now engaged in the business of banking in the District of Columbia shall, after the passage of this act, be permitted to enter upon said business in the said district, nor shall any corporation now or hereafter engaged in the business of banking be permitted to establish branch banks in said district until after it shall have secured the approval and consent of the Comptroller of the Currency; and each one of the officers of such corporation so offending shall be punished by a fine not exceeding \$1,000 or imprisonment not exceeding one year, or by both fine and imprisonment, in the discretion of the Court.”

As to which we observe that the language used is such as to indicate that the Congress apparently believed they were regulating an existing power, not conferring one previously denied.

But upon what considerations is it to be assumed that the members of the 69th Congress, which enacted this last-mentioned statute, the 56th, which dealt with the St. Louis Exposition, the 52nd, which dealt with the Chicago Fair, or even the 38th, which enacted (as a part of a revenue law) the invitation of state banks into the national system, possessed information as to the true meaning to be given to R. S. Sec. 5190, which is not equally and alike available to all of us?

In this land of multiplicity of legislation, where statutes are not always scientifically written and are frequently uncertain both in their assumptions and their expressions, there is no more unreliable guide to the interpretation of a statute than argumentative inferences from subsequent legislation.

In *Postmaster General v. Early*, 12 Wheat. 136 (148), Mr. Chief Justice Marshall, speaking for the Court, observed that "a mistaken opinion of the Legislature concerning the law does not make law."

In *United States v. Claffin*, 97 U. S. 546 (548), are these observations by Mr. Justice Strong, writing the opinion:

"But that clause indicates a belief on the part of Congress that it had been previously repealed and, doubtless, that it was repealed by the Act of 1866. The indication is found in the

words that declare all parts of acts not contained in the revision, but other portions of which are, to have been repealed or superseded by subsequent acts. This, however, though entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief."

And in *District of Columbia v. Hutton*, 143 U. S. 18 (27), Mr. Justice Lamar, speaking for the Court, said:

"It is manifest, however, from an inspection of this section that there was no recognition in it by Congress that said section 354 was still subsisting law. But even if Congress had supposed that that section was still the law, when as a matter of fact it had been repealed, it would make no difference in this consideration (*Postmaster General v. Early*, 12 Wheat. 136, 148; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 270; *United States v. Claffin*, 97 U. S. 546, 548). The question is, was said section 354 repealed by the Act of 1878? That is a judicial question, to be determined by the courts upon a proper construction of that section and subsequent legislation upon the same subject matter, and is not for the legislative branch of the Government to determine."

In *Endlich on Interpretation of Statutes* (Ed. 1888),

Sec. 372, on the authority of certain utterances of the English courts therein cited, it is said:

“But an act of Parliament does not alter the law by merely betraying an erroneous conception of it, so as to make it accord with the conception.”

Neither the course of subsequent legislation, nor yet of departmental construction, has been such as to wrest R. S. Sec. 5190 from the meaning to be deduced from the language employed in its enactment. Its meaning is believed to be as herein contended, and not as asserted by the Attorney-General of the State.

Upon which considerations it is respectfully but earnestly submitted that the opinion of the Supreme Court of Missouri is in error as to the matters therein considered, and that it should be reversed.

FRANK B. KELLOGG,

JAMES C. JONES,

FRANK H. SULLIVAN,

For Plaintiff in Error.

JONES, HOCKER, SULLIVAN & ANGERT,

506 Olive Street,

St. Louis, Mo.



No. 910252

APR 9 1922

WM. B. STANLEY

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

8

FIRST NATIONAL BANK IN ST.
LOUIS,

Petitioner,

vs.

STATE OF MISSOURI ex inf.
JESSE W. BARRETT,

Respondent.

**BRIEF FOR DEFENDANT IN ERROR AND RE-
SPONDENT IN CERTIORARI IN OPPOSITION
TO APPLICATION FOR SUPERSEDEAS OR
STAY OF PROCEEDINGS OR INJUNCTION.**

✓ JESSE W. BARRETT,
Attorney-General of Missouri.

✓ MERRILL E. OTIS,
Assistant Attorney-General of Missouri.

✓ SAM B. JEFFRIES,
✓ WILLIAM T. JONES,
✓ HAROLD R. SMALL,
✓ MARION C. EARLY,
✓ EDWARD W. FORISTEL,

Of Counsel.

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STATEMENT.

A few days prior to June 27, 1922, the First National Bank in St. Louis publicly announced its purpose to open a number of branch banks in the City of St. Louis and did establish a branch bank at 818 Olive street, St. Louis, Missouri, at which it has at all times since conducted and now is conducting a branch banking business, separate and apart from its banking house at the southwest corner of Broadway and Locust streets, St. Louis. Branch banking

by state banks being prohibited under the laws of the State of Missouri, and there being no authority under the acts of Congress for the establishment of branch banks by national banks, the Attorney-General of Missouri instituted in the Supreme Court of Missouri this suit against the First National Bank in St. Louis, the purpose of which was to compel this bank to cease operating its branch bank which it had only a few days before established, and to prevent it from opening other branch banks in the City of St. Louis, which it was preparing to do.

The petition filed June 27, 1922, by the Attorney-General of Missouri in the Supreme Court of that state is set forth at pp. 1 to 5, inclusive, of the transcript of the record filed herein.

After the filing of the above mentioned petition in the Supreme Court of Missouri, that tribunal issued an ancillary restraining order whereby it directed that "pending the final determination of this cause" the First National Bank, together with its officers, agents and servants, be restrained from establishing and operating branch banks in Missouri other than the branch bank already established by it, and from carrying on a banking business at any place excepting at its regular banking house, and excepting at the branch bank already established by it.

The Court further issued an order upon the First National Bank to show cause on or before the 28th

day of July, 1922, by what warrant, right or authority it had established the branch bank aforesaid, and by what warrant, right and authority it proposed to establish and conduct other branch banks in St. Louis.

The above restraining order and order to show cause are found on pp. 6, 7 and 8 of the transcript of record.

Thereafter, the First National Bank in St. Louis filed its motion to dissolve the ancillary order, its motion to quash and dismiss the alternative writ, and its demurrer to the information, which pleadings appear at pp. 9 to 13, inclusive, of the transcript.

Prior, however, to the filing of any of said motions, the bank filed its petition for removal of the cause to the District Court of the United States for the Central Division of the Western Judicial District of Missouri, but this petition was later withdrawn.

On the first day of November, 1922, the case was submitted to the Supreme Court of Missouri upon the pleadings aforesaid, upon briefs and after argument thereon by counsel for the respective parties, with the result that on March 3, 1923, judgment was rendered against said bank, as appears on pages 13 and 15 of the transcript of record.

From this judgment the First National Bank in St. Louis is perfecting an appeal to this Court, either by a writ of error or writ of certiorari.

The issuance of a writ of certiorari being a matter resting in the sound discretion of the Court, we here make a short presentation of the substantial facts.

The laws creating the present national banking system were enacted by Congress in 1864 and 1865. These acts as originally passed do not provide for the establishment of branch banks, nor has there since been enacted by Congress any law, by way of amendment or otherwise, giving national banks the right to establish branch banks.

The legislative construction upon our National Banking Act in this respect is shown clearly by the fact that the law as originally enacted authorizing state banks to be converted into national banks, could not be taken advantage of by those state banks having branch banks, and Congress later, recognizing this inability of state banks with branch banks to convert them into national banks, enacted Section 5154, U. S. R. S., which gives state banks possessing branch banks the right to be converted into national banks and to retain such branch banks, but does not allow such converted banks to establish further or other branch banks.

Again, when the Columbian Exposition was held at Chicago in 1893, Congress deemed it necessary to provide by special act for the establishment of a branch bank inside the fair grounds and within the corpo-

rate limits of the City of Chicago, and when the Louisiana Purchase Exposition was held at St. Louis in 1904, Congress again enacted a special law giving the right to establish a branch bank inside the exposition grounds and within the corporate limits of the City of St. Louis.

Many times during the history of our present banking system bills have been introduced in Congress to authorize the establishment of branch banks by national banks, but all such legislation has met with legislative disapproval, thus showing that Congress has not only construed the acts of Congress as granting no right to national banks to open and operate branch banks, but that Congress has withheld this right from them.

The construction placed upon the acts in question by Congress has been concurred in and followed by the executive department of the federal government. The Comptroller of the Currency is charged with the duty of enforcing our national banking laws, and the incumbent of this office has universally held, in his printed instructions regarding the organization and powers of national banks, that Section 5134, U. S. R. S. (U. S. Comp. Stat. 1916, Sec. 9659) provides in part that the organization certificate of a national bank shall show "the place where its operations of discount and deposit are to be carried on," and Section 5190, U. S. R. S. (U. S. Comp. Stat. 1916, Sec.

9744), that "the usual business of each national banking association shall be transacted at an office or banking house (not offices or banking houses) located in the place (not places) specified in its organization certificate." (Instructions of the Comptroller of the Currency relative to the organization and powers of National Banks, 1920, pp. 110, 111.)

The above has been the universal construction of the Comptroller of the Currency throughout the history of the present national banking system, and this construction has been approved by the Solicitor of the Treasury of the United States in an opinion rendered August 10, 1899, on the question of the right of a national bank to establish and maintain a cash room at some point distant from its banking house, for the purpose of receiving deposits and paying checks.

In conformity with the above construction of the federal statutes authorizing national banks, no state bank has been permitted to operate branch banks in the State of Missouri since the adoption of the federal statute creating the present national banking system. Since 1865 Missouri has adhered to the policy adopted by the federal government. In conformity with the accepted construction of the federal statute as applicable to branch banks, the State of Missouri, through its Legislature, enacted laws providing that

no bank shall maintain in this state a branch bank (Section 11737, R. S. Mo. 1919, Subdiv. 1).

The fact that the First National Bank in St. Louis opened up its one branch and was preparing to establish others necessarily created great apprehension upon the part of the banking interests of Missouri, and of the City of St. Louis in particular. State institutions which were denied the right by positive law realized their helpless position, and more particularly was this true when other national banks in St. Louis, Missouri, began to seek locations for the establishment of branch banks.

Believing that the congressional and executive construction of our federal banking statutes was the correct construction, knowing that the law was being violated, and realizing that Missouri, by positive laws, prohibited the business of branch banking in conformity with what was the general and accepted construction of federal laws, and after being advised that the Comptroller of the Currency had been notified of the conduct of the First National Bank in St. Louis and requested to intercede on behalf of the general banking interests of the State of Missouri and had declined to do so, the Attorney-General of Missouri deemed it advisable and absolutely essential that suit be instituted to cause the cessation of such unlawful acts of the First National Bank.

The result of the proceeding for quo warranto was that the Supreme Court of Missouri, on March 3rd,

1923, ordered that the bank "be ousted from the privilege of operating its said branch bank located at No. 818 Olive street, in the City of St. Louis, Missouri, or any other branch bank, and from conducting a banking business thereat as prayed in the said information in the nature of quo warranto."

The bank has now, by writ of error and certiorari, sought to have the case appealed to this court. The bank has filed an application for supersedeas or stay of proceedings or injunction in this court and has also filed its motion, as plaintiff in error and as petitioner in certiorari, to advance this case upon the docket of this court. The bank has served notice on the State of Missouri that on Monday, April 9th, 1923, it will present to this court a petition for writ of certiorari, and we assume that it is the purpose of the bank to present at the same time its application, copy of which has been served, which application is for supersedeas or stay of proceedings or injunction.

Referring to the First National Bank's motion to advance this case on the docket, the State of Missouri has no objection to an early setting of the case, provided the Court assumes jurisdiction by writ of error or certiorari.

The main question to which the State of Missouri desires to address itself in this matter is the question of whether any supersedeas or stay or injunction shall issue and, if so, to what extent.

POINT.

No supersedeas or stay order or injunction should be granted in this case that will permit the First National Bank, plaintiff in error, to open or operate, pending this appeal, any branch banks in St. Louis in addition to the one at 818 Olive street, which it is now operating.

This branch bank was being operated, and was the only one being operated, at the date of the institution of this suit and it is the only one now in operation.

ARGUMENT.

While the equities of the situation may justify the granting of a supersedeas that will allow the bank to continue in operation the one branch bank which it was operating at the commencement of this quo warranto proceeding in the Supreme Court of Missouri, no principle of equity or justice warrants the granting of a supersedeas that will permit the bank to extend its branch bank operations beyond what they were at the time of the commencement of this suit; that is to say, beyond the operation of the one branch bank that it was operating at that time and is still operating.

The bank's petition in this connection seeks to have the judgment of the Supreme Court of Missouri in this case entirely vacated pending this appeal, so the bank may be permitted to open up and operate as many branch banks in the City of St. Louis as it desires. The State of Missouri respectfully submits that the supersedeas, if granted, should be so limited that the status quo will be maintained pending final determination of the cause by this Court, as it was at the institution of this suit in the Supreme Court of Missouri.

The petition of the First National Bank for a supersedeas or injunction that will entirely nullify the

decree of the Supreme Court of Missouri and permit the bank to open and operate additional branch banks while this appeal is pending, should be denied, for the following reasons:

1. The operation of branch banks is not permitted by the National Banking Laws. Section 5190, U. S. R. S. provides:

“The usual business of each national banking association shall be transacted at **an** office or banking house located in the place specified in its organization certificate.”

Pratt's Digest of Federal Banking Laws, a recognized authority on national banks, 1920 edition, page 100, says:

“It is settled beyond doubt that a national bank, independently of the National Bank Act, is not, under its charter, authorized to establish a branch bank for the purpose of carrying on a general banking business in the place designated in its certificate of organization, or anywhere in the United States; and, furthermore, that Section 5190, U. S. R. S., properly construed, restricts the carrying on of a general banking business by a national bank to **one** office or banking house in the place designated in the association's certificate of organization, except in so far as that section is amended by Section 25 of the Federal Reserve Act, which permits foreign branches under certain conditions.”

This question was exhaustively discussed in the opinion of Attorney-General Wickersham, dated May 11th, 1911, and appearing in Volume XXIX, Opinions of Attorney-General, pp. 81 to 98, and, without attempting to enter upon a discussion of the question here, we beg to refer to that opinion, which concludes as follows:

“First. Independently of Section 5190, R. S., a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and

“Second. That Section 5190, R. S., properly construed, restricts the carrying on of the general banking business of a national bank to one office or banking house in the place designated in the association's certificate of organization.”

This question has never been directly passed upon by this Court, but the universally recognized and accepted construction of the law, as set out above, was recognized by this Court in the *First National Bank v. Hawkins*, 174 U. S. 364, wherein the Court said:

“Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and busi-

ness men deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking laws, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks, in such a case, would be in fact, though not in form, branches of the larger ones."

The construction of the National Banking Act in this connection, as above stated, appears never to have been seriously questioned since the adoption of the act in 1864, until the First National Bank of St. Louis started on its career of branch banking in 1922.

2. The operation of branch banks is expressly prohibited by the laws of Missouri. Section 11737 R. S. Mo. 1919, provides:

"Every such corporation (referring to banking corporations) shall be authorized and empowered; 1. To conduct the business of receiving money on deposit and allowing interest thereon, and of buying and selling exchange, etc. * * *. Provided, however, that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house."

Section 11684, R. S. Mo. 1919, provides:

"No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state, or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, or of issuing bills, notes or other evidences of debt, etc. * * *."

Under these provisions, a national bank, in conducting branch banks in the State of Missouri, is violating the laws of both the nation and the State of Missouri.

Unless it is authorized to conduct branch banks by the National Banking Laws, for if branch banks are not permitted by the National Banking Laws, national banks cannot claim the protection of these laws when charged with the violation of the provisions of the state statutes above quoted.

(3) Either the United States or Missouri, or both, have the power to stop the doing in Missouri of any act by a national corporation that is in excess of the national corporation's power to do, and is at the same time an act that is violative of the policy and positive law of Missouri.

First National Bank v. Commonwealth, 143 Ky. 816, 34 L. R. A. (n. s.) 54;

Hale v. Henkle, 201 U. S. 43;
Halter v. Nebraska, 205 U. S. 34;
Gilbert v. Minnesota, 254 U. S. 325, 329, 332.

A mere individual may stop a state officer from doing an act, under a state law, that is unconstitutional.

Exparte Young, 209 U. S. 123.

Individuals may stop an act being done by a Federal official under a Federal law that is unconstitutional.

Wilson v. New, 243 U. S. 332;
Hammer v. Dagenheart, 247 U. S. 251;
Kennington v. A. Mitchel Palmer, 255 U. S. 100.

A state may stop an act being done by a federal official under an unconstitutional federal law.

State of Missouri v. Holland, U. S. Game Warden 252 U. S. 416.

If a state may stop an act of a federal official being done under an unconstitutional federal law, it follows that a state may stop an act being done by a national corporation that is not done under any federal law, but is done without federal power or authority to do it, when such act is in addition also

an outlaw act against the policy and positive law of the state. In short, the shield of the national charter will not permit a national corporation to run amuck in a state in defiance of all law and all authority, and the state in the just and proper exercise of its police power has a right to stop excesses even of a national corporation, when particularly the stopping of such excess is in thorough accord with the policy, aims and purposes of the national government.

First National Bank v. Commonwealth, 143 Ky. 816;

Gilbert v. Minnesota, 254 U. S. 325, 329, 332.

Missouri has the right to sue a national bank in its own courts.

Herman v. Edwards, 238 U. S. 107.

A state has the right to stop an act being done in the state by a foreign corporation when such act is in violation of the law of the state.

Standard Oil Company v. Missouri, 224 U. S. 270.

4. The First National Bank, when it began its branch banking operations in St. Louis, knew of the long established, accepted and uniform construction of the National Banking Laws as above set out, and knew that no other national bank in the United States

had established and maintained branch banks, excepting under special acts of Congress granting such power under clearly specified conditions, and further knew that in taking such action, it was doing so without any authorization by the Comptroller of the Currency therefor. It, therefore, knew the hazard it was taking in embarking upon such a career, and cannot complain of the predicament it finds itself in at this time.

5. The highest court of the state of Missouri has, after full consideration, determined that the operation of a branch bank by the First National Bank was without federal authority and in violation of the laws of the State of Missouri. To grant a supersedeas of the scope and effect sought by the bank, pending this appeal, would enable it to commit further and additional acts of violation of the laws of the Nation and the State of Missouri. Its effect would be to nullify this Missouri Supreme Court decree completely, pending this appeal.

6. The effect of allowing the First National Bank to open and operate additional branch banks in St. Louis would make it necessary for other national banks to do or attempt to do likewise as a matter of protection against that bank's competition. If this is done, one of two results is bound to follow, either

the Attorney-General of Missouri, as a matter of consistent practice, will be required to proceed against such other banks in like proceedings as this, or, if such actions are not taken, the banking business of the City of St. Louis will be, seriously disturbed and demoralized. Furthermore, if the latter course is permitted, inherent and manifest injustice will result to the state banks of Missouri, and particularly of St. Louis, they being expressly prohibited from operating branch banks.

7. The act of the First National Bank complained of, being violative of both the federal and state laws, is, therefore, one that both the nation and the state, or either, may take necessary action to prevent. This proceeding by the State of Missouri should, therefore, be regarded, as in truth it is, a proceeding not only on behalf of the State of Missouri, but also in behalf of the United States, and as an aid and protection of the sovereignty of both the nation and the state.

8. The damage that will result to the State of Missouri and to its citizens, including other banking institutions, state and national, located within the state, are such that they will be incapable of pecuniary admeasurement, and hence no supersedeas bond that may be given by the First National Bank herein, however large, will afford protection to the State of

Missouri and its citizens in the event the judgment and decree of the Supreme Court of Missouri is affirmed by this Honorable Court. Furthermore, there would be no adequate remedy available to the general public, in whose interest this suit was instituted.

9. The injury to and the damage that would be suffered by the First National Bank in continuing the status quo until the determination of this cause in this court, if the decree should be set aside, would be inconsequential as compared to the injury and damage to the State of Missouri and the citizens thereof if the protection of the decree and the injunctive order in this case is removed, and the bank is permitted to proceed at once with its plan of establishing additional branch banks throughout the City of St. Louis.

10. The evident purpose of the First National Bank is to establish its branch banks before a final decree can be secured herein prohibiting it from doing so, in the expectation that, by congressional legislation, or otherwise, it will be permitted to maintain and operate these banks, even though a decree adverse to it be rendered in this case, thereby securing a great advantage over other banks operating in St. Louis.

11. This proceeding was instituted by the legal

representative of the State of Missouri, in the name of the state, and for the protection of the public interest, and as against this the First National Bank can set up only its private interests. As between a public interest and private interest the former should receive first consideration.

12. The courts are always disposed not to disturb the status quo pending final determination of the cause. For this reason the rule is well established in equity that supersedeas will not of and by its own force operate to set aside a prohibitive injunction, but will a mandatory injunction. The former preserves the status quo, while the latter would change it. The same distinction applies generally as between self-executing and non-self-executing judgments and decrees.

On this point it is said in a comprehensive note in **38 L. R. A. (n. s.) 436**, to the case of **Hulbert v. California Portland Cement Co.**, **118 Pac. 928**:

“As ordinarily the perfecting of an appeal from a judgment, decree or order stays only affirmative proceedings thereunder, an appeal from a judgment, decree or order granting an injunction, while it suspends the effect of the injunction **if it be mandatory**, requiring or permitting positive action, does not suspend the opera-

tion of the injunction if it be merely prohibitory so that it is self-executing, requires no affirmative action and merely maintains the status quo pending the appeal. As said in *Fort Worth Driving Club v. Fort Worth Fair Assn.*, 56 Texas Civ. App. 162: 'The great weight of authority supports the proposition that it is only where the preliminary order is mandatory (that is, requires affirmative action, performance of specified things) that an appeal with supersedeas suspends the order. In cases, however, where, as here, the order is prohibitive merely, the appeal leaves it operative—the principle of the rule being the same in both cases, viz., to preserve the status quo of the parties and subject matter pending the appeal, leaving them as nearly as possible in the condition the court finds them at the time the appeal is perfected, thus preventing affirmative action either in accord with or violative of the terms of the order.' So, if the injunction is mandatory in effect, the appeal stays proceedings; if merely prohibitory, matters are to remain in statu quo and there are no proceedings to be taken under it. No affirmative acts are necessary to execute it which could be stayed by the appeal (*Maloney v. King*, 26 Mont. 487)."

Numerous other cases are cited in this note in support of this proposition.

13. We quote from a few cases as illustrative of the

disposition of the Courts in exercising their discretion granting writs of supersedeas as follows:

In the case of **Barnes v. Chicago Typographical Union**, 232 Ill. 402, the Court said:

“To adopt a rule that the court granting an injunction must stand idly by and see it violated while an appeal is pending, and after the case is reinstated in that court may then proceed to punish would be attended with evil consequences. All that it would be necessary for a defendant to do to secure immunity until the case should be reinstated in the court would be to pray an appeal and file a bond. * * * No reason is apparent to us why the superior court should be refused its right to maintain its authority as a matter not affected in any way by the appeal and which is not dependent in any respect upon the final outcome of the suit until the decree has been affirmed by the appellate court, since the question whether the decree was erroneous or not is in no way involved in maintaining the existing status. If the court should be denied the right to compel obedience to the prohibition of the decree until the original case has completed its rounds through the courts, appellees might lose all benefits of their litigation and have their business ruined although the decree should finally be affirmed. We are not prepared to adopt such a doctrine.”

. In the case of **Jacoby v. Shomaker**, 26 Fla. 502, it was held that while the Appellate Court upon proper security being given for the indemnity of the appellee against resulting loss or damage will grant a supersedeas of the injunction in any case where the damage to result from the supersedeas is of a character that can be compensated in money and the appeal is not frivolous, it will not, unless the error of the injunction decree is palpable, grant a supersedeas in a case of such nature that, if the decree granting the injunction is ultimately affirmed, the appellee's injury cannot be compensated in money or otherwise, while if the decree is ultimately reversed, the damage which will result to the appellant from the injunction is clearly one of a pecuniary character—such as in a case of a suit virtually in behalf of the public or the people of a certain district to enjoin the establishment or continuance of a retail liquor business.

In **Corpus Juris**, Vol. 3, page 1279, Sec. 1403, it is said:

“In some states the general rule that self-executing judgments are not within the statute providing for a supersedeas or stay is applied to judgments of removal or ouster from office, as in quo warranto and similar proceedings and judgments in election contests. And it is held that as no process is necessary to place a successful

relator in possession of an office, an appeal or writ of error will not operate as a supersedeas to prevent him from exercising the functions of the office and the filing of a supersedeas bond will not suspend the operation of the judgment.”

In the case of **State ex rel. v. Woodson**, 128 Mo. 497, l. c. 518, it is said:

“When a judgment is self-enforcing a supersedeas does not alter the state of things created by the judgment from which the appeal is prosecuted” (citing Elliott on Appellate Procedure, Sec. 392, and cases cited).

The Attorney-General of Missouri feels that he may not be justified in insisting, if certiorari is granted, that the decree of the Supreme Court of Missouri should be enforced as to the one branch bank at 818 Olive street while this appeal is pending, and he therefore consents, if this Court shall deem it proper, that an order or supersedeas be granted staying, pending this appeal, the execution of that part of said decree by which the First National Bank is required to discontinue the operation of this one branch bank.

But the Attorney-General of Missouri objects to the granting of a supersedeas or stay or injunction in connection with this appeal that will permit the

First National Bank to open and operate any additional branch banks.

Respectfully submitted,

Jessett Barrett.....
Attorney-General of the State of
Missouri.

Marrett C. Otis.....
Assistant Attorney-General of the
State of Missouri.

Sam B. Jeffries.....

William G. Jones.....

Harold R. Small.....

Marion C. Early.....

Edward M. Farnstel.....
Of Counsel.

April, 1923.

Service of copy of the foregoing brief is acknowledged this.....day of April, 1923.

.....
Of Counsel for Petitioner.

FIRST NATIONAL BANK OF
ST. LOUIS,

PAY TO THE ORDER OF

STATE OF MISSOURI
W. BARRETT, Treasurer

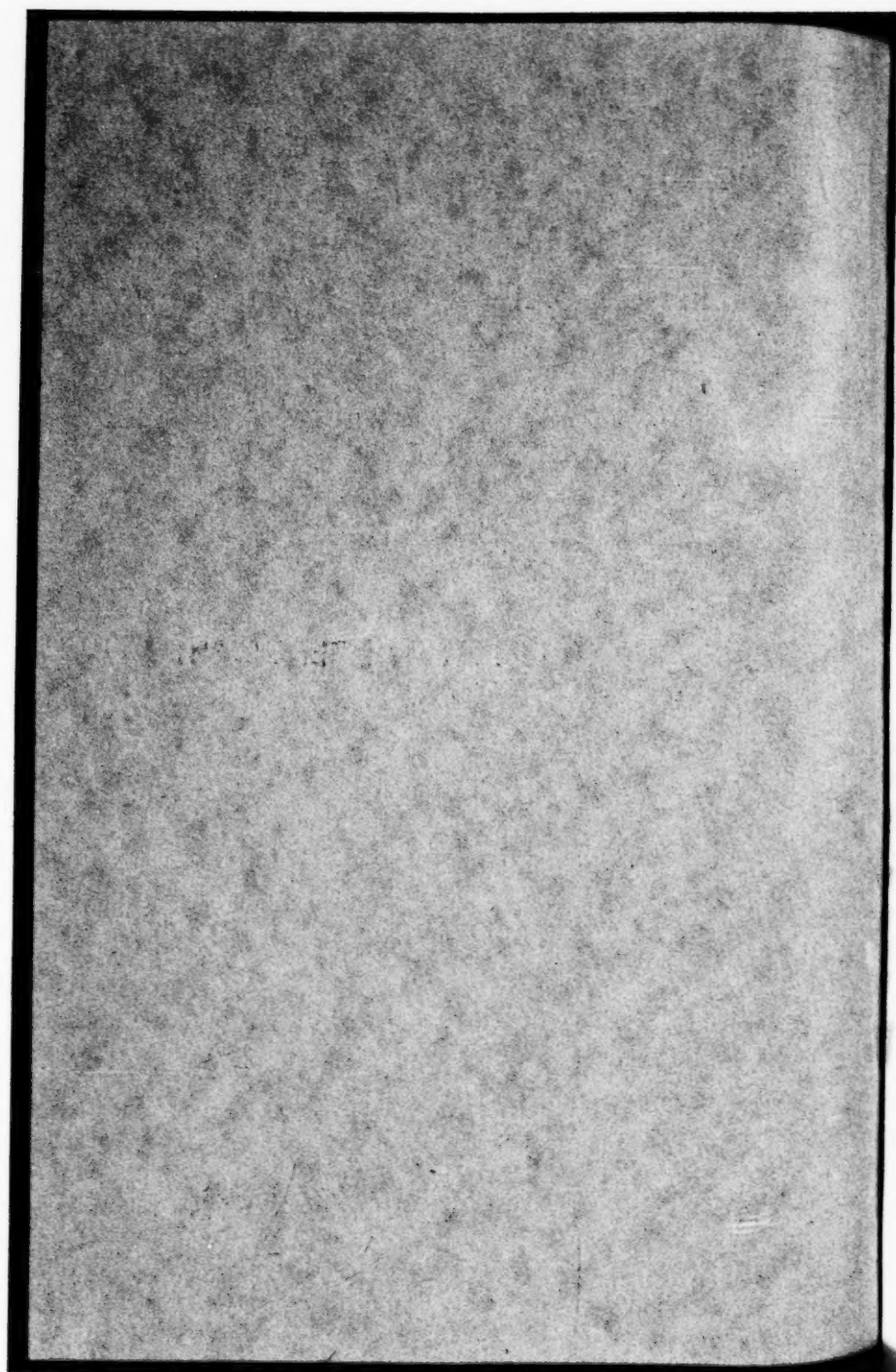
CASH AND CURRENCY FOR DEPOSITARY
IN TRUST

JOHN W. BARNETT
Treasurer of the State

RECEIVED OF THE
TREASURER OF THE STATE
FOR DEPOSITARY IN TRUST
(Amount)

SAM R. JEFFERS
WILLIAM T. MOORE
BARNES J. SMITH
BARNES C. SMITH
EDWARD W. SMITH

STATE OF MISSOURI, DEPARTMENT OF REVENUE



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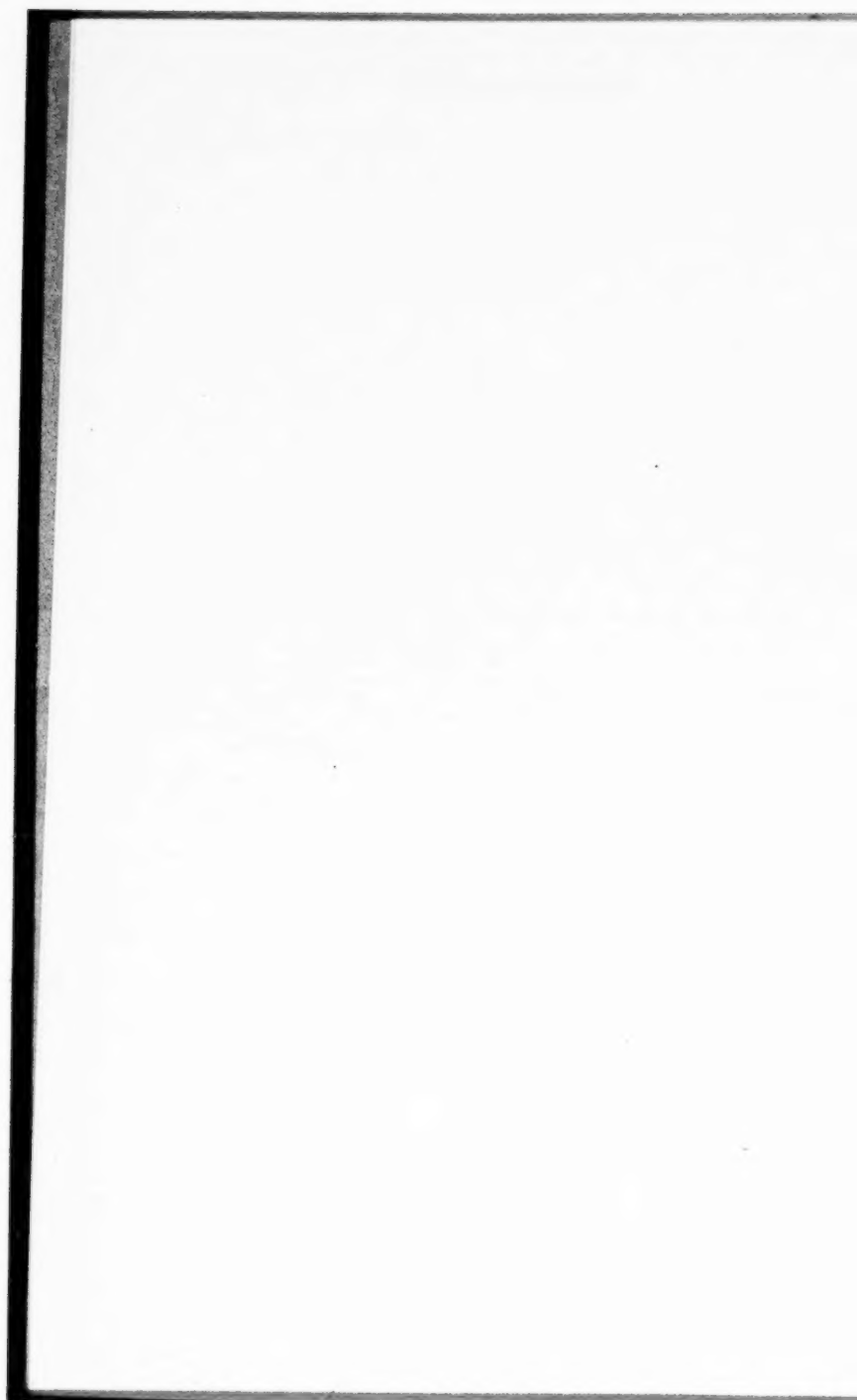
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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN
ST. LOUIS,

Plaintiff in Error,

vs.

STATE OF MISSOURI ex inf. JESSE
W. BARRETT, Attorney-General,
Defendant in Error.

No. 919.

**BRIEF AND ARGUMENT FOR DEFENDANT
IN ERROR.**

STATEMENT.

On June 15th, 1922, the First National Bank in St. Louis, plaintiff in error here, established in the City of St. Louis at a location other than that of its regular banking house a branch bank "for conducting a general banking business." At the same time it announced that it would shortly open from twelve to fifteen other like branch banks at various locations in the City of St. Louis.

This action of the plaintiff in error was taken in direct disregard of the last official pronouncement on this subject by the Attorney-General of the United

States, under date of May 11th, 1911 (see opinion of Attorney-General Wickersham set out in full in Appendix A hereof), in which it had been ruled:

"First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and,

"Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization."

It was taken in direct disregard of the published and then effective instructions of the Comptroller of the Currency prohibiting the establishment by national banks of branch banks, being Instructions of the Comptroller of the Currency Relative to the Organization and Powers of National Banks, for the year 1920, which instructions are set out in full in Appendix B hereof.

On August 15, 1922, the Comptroller of the Currency issued a public statement to the effect that he had in no case authorized a national bank to establish branch banks in those states wherein state banks were not permitted under state laws the same privilege.

At the time of the aforesaid action on the part of the plaintiff in error, the laws of Missouri provided that:

“No bank shall maintain in this state a branch bank, or receive deposits, or pay checks except in its own banking house” (R. S. Mo. 1919, Sec. 11737).

Under these circumstances, the Comptroller of the Currency having been requested to prevent the unlawful action of the plaintiff in error as aforesaid, and having declined so to do, the Attorney-General of Missouri, on June 27th, 1922, filed in the Supreme Court of Missouri an information in the nature of quo warranto (Tr. of Rec., p. 1), wherein he charged that plaintiff in error, having been incorporated to conduct a general banking business in the City of St. Louis, Missouri, and having theretofore selected a location for conducting its business, which for several years it had occupied and used as its banking house, had illegally opened a branch bank “for conducting a general banking business” at a different location “in a separate building located several blocks from the banking house before mentioned, which said branch bank it is now conducting and proposes to continue to conduct and where it is engaged in the business of banking, discounting bills, notes and other evidences of debt, receiving deposits

and paying out the same upon check, buying and selling bills of exchange and lending money." It was further charged that the plaintiff in error was arranging and proposed "shortly to open other branch banks, some twelve or fifteen in number, at various points or locations in the City of St. Louis." The information prayed that the plaintiff in error be ousted from the privilege of operating the branch bank already established or any other branch banks and from conducting a banking business at any place or location other than one banking house or office maintained by it for such purposes.

On September 8th, 1922, plaintiff in error filed its motion to quash (Tr. of Rec., p. 6) and dismiss the alternative writ theretofore issued, to wit, on June 28th, 1922 (Tr. of Rec., p. 4), requiring plaintiff in error to show cause on or before July 28th, 1922, why it should not be ousted from the privilege of operating branch banks.

At no time did plaintiff in error comply with the order to show cause, but on October 24th, 1922, plaintiff in error filed its demurrer (Tr. of Rec., p. 6).

On March 3rd, 1923, the Supreme Court of Missouri delivered its opinion (Tr. of Rec., p. 8), and pronounced judgment (Tr. of Rec., p. 7), ousting plaintiff in error of the power and privilege of possessing and operating branch banks.

Thereafter, plaintiff in error sued out its writ of error to this Court.

Supersedeas has been granted to permit the Bank to continue to operate its branch bank at 818 Olive street, pending the determination of this case.

The case has been advanced for hearing to April 30, 1923.

The question is, whether the branch banking of a national bank is unauthorized and illegal under national and Missouri law, and if so, whether Missouri by quo warranto in its own courts can suppress the usurpation.

For more ready understanding, the question may profitably be divided into the following four:

First. Is branch banking authorized (by implication, as the bank claims) by the National Bank Act?

Second. If branch banking is not authorized, but is prohibited by the National Bank Act, can such branch banking by the bank, if also violative of Missouri statutes governing banks, be stopped by Missouri?

If the answer to the first question is in the negative, that branch banking is unauthorized, and to the second question is in the affirmative, that Missouri may stop branch banking, two minor questions remain:

Third. Can Missouri by quo warranto stop the unauthorized, illegal operations in Missouri of a national corporation as Missouri can stop the unauthorized, illegal operations in Missouri of a foreign corporation?

Fourth. May Missouri employ her own courts to stop respondent?

BRIEF OF ARGUMENT.

I.

Branch Banking Unauthorized and Prohibited by Nation and State.

It is unlawful for a national bank to establish or operate a "branch bank" whereat it conducts "a general banking business" and engages "in the business of banking by discounting bills, notes and other evidences of debt, receiving deposits and paying out the same upon check, buying and selling bills of exchange and lending money." (Quotations from the Information, Tr., p. 1).

1. The United States statutes relative to national banks constitute the measure of the authority of such corporations, and they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established ("such incidental powers as shall be necessary to carry on the business of banking" [quotations from the Statute, Sec. 5136, U. S. R. S.]).

California National Bank v. Kennedy, 167 U. S.
362, l. c. 366;

Logan County National Bank v. Townsend,
139 U. S. 67, l. c. 73;

7 Corpus Juris 807.

2. No express authority is conferred by the United States statutes upon national banks to establish or operate branch banks.

U. S. R. S., Sec. 5134 (U. S. Comp. Stat. 1916, Sec. 9659);

U. S. R. S., Sec. 5136 (U. S. Comp. Stat. 1916, Sec. 9661);

U. S. R. S., Sec. 5155 (U. S. Comp. Stat. 1916, Sec. 9695);

Act of Congress, May 1, 1886, c. 73, Sec. 2, 24 Stat. 18 (U. S. Comp. Stat. 1916, Sec. 9662);

U. S. R. S., Sec. 5190 (U. S. Comp. Stat. 1916, Sec. 9744);

Act of Congress, Dec. 23, 1913, c. 6, Sec. 25, as amended, Act of Congress Sept. 7, 1916, c. 461 (U. S. Comp. Stat. 1916, Sec. 9745).

3. The power to operate branch banks is not one of "such incidental powers as shall be necessary to carry on the business of banking."

Opinion of Attorney General Wickersham in the matter of the Lowry National Bank of Atlanta, Ga., Vol. 29, Opinions Attorney-General 81;

Opinions of Solicitors of the Treasury, under dates of August 10th, 1889, and November 15, 1910, cited in the Attorney-General's Opinion, *supra*, page 97;

State of Missouri *ex inf. v. First National Bank* (the present case), Transcript of Record, p. 8;

Bruner v. Citizens Bank, 134 Kentucky 283;

Morehead Banking Co. v. Tate, 122 N. Car. 313;
Magee on Banks and Banking, 2nd Edition,
1913, pp. 42-45;

Pratt's Digest of Federal Banking Laws, 1920
Edition, p. 100, and 1922 Supplement
thereto, p. 7;

Morse on Banks and Banking, Sec. 46;

1 Morawetz on Corporations, Sec. 387;

Zane on Banks and Banking, Sec. 24.

4. Not only has a national bank no express or implied authority to establish or operate a branch bank, but it is expressly restricted by the statute (U. S. R. S. 5190) to "an office or banking house."

A. This statute restricts a national bank to one or a single banking house.

Opinion of Attorney-General Wickersham, 29
Opinions Attorney-General 81, l. c. 92, 98;

Opinion of Solicitor of the Treasury Hepburn,
quoted in Magee on Banks and Banking,
2nd Edition, p. 44;

Armstrong v. National Bank, 38 Fed. Rep. 883;

State ex inf. v. First National Bank (the present case), Transcript of the Record, p. 8;

Pratt's Digest of Federal Banking Laws, 1920
Edition, p. 100, and 1922 Supplement
thereto, p. 7;

Instructions of the Comptroller of the Currency, 1920, p. 110.

B. The ordinary meaning of the word "an" is one.

Funk and Wagnall's New Standard Dictionary;
Webster's New International Dictionary;
Black's Law Dictionary, 2nd Ed., p. 67;
2 Corpus Juris, p. 332;
Hastings v. Brown, 1 El. & Bl. 451, l. c. 454;
118 Eng. Rep. Full Reprint, 505, l. c. 506;
Moyahan v. City of New York, 205 N. Y. 181;
People v. Ogden, 8 Appellate Div. 464, l. c.
467, 40 N. Y. Supplement 827;
Wastl v. Montana Union Ry. Co., 61 Pac. 9, l. c.
15;
Wades v. Figgatt et al., 75 Va. 575, l. c. 582.

C. Not only does the word "an," as used in this statute, denote the singular, but so also do the words "office" and "banking house" and "usual business." Nothing in the statute suggests plurality.

5. At the time of the adoption of the present National Bank Act (1864), branch banking was well known. Branch banks had been expressly permitted under the first United States Bank Act and under the second National Bank Act. Moreover, at the time of the adoption of the present (or third) National Bank Act, branch banks were permitted under express statutory authority in a number of states. It is a matter of history that the subject of branch banking and of its corollary, the centralization of banking power, was a subject of bitter controversy.

Under such circumstances it is inconceivable that Congress intended that branch banking should be permitted under the National Bank Act as one of the incidental powers of a national bank, of too little importance to be specifically set out and without any provision whatever regulating branch banks, their number, location, etc., the amount of capital to be prorated to each, or the method and manner of conducting them. Under such circumstances, the failure expressly to grant the power to establish branch banks must be construed as an implied prohibition of such power.

Opinion of Attorney-General Wickersham, 29
Opinions Attorney-General 81, l. c. 94;
California Bank v. Kennedy, 167 U. S. 362,
l. c. 366;

First National Bank v. National Exchange
Bank, 92 U. S. 122, l. c. 127.

6. Congress has consistently construed the United States statutes as denying to national banks the right to establish and operate branch banks, and has accordingly enacted special enabling acts when in particular instances it has desired to permit national banks to operate branch banks.

Section 5155, R. S. U. S., enabling state banks
having branches to retain branches upon
conversion to national banks;

Act of Congress, May 12, 1892, authorizing a branch bank at the Chicago Exposition;
Act of Congress, March 3, 1901, authorizing a branch bank at the Louisiana Purchase Exposition.

7. Not only has Congress construed the United States statutes as prohibiting branch banks, but the same construction has been placed upon them throughout by the Treasury Department and the Comptroller of the Currency.

Opinion of Attorney-General Wickersham, 29
Opinions Attorney-General 81, l. c. 97;

Opinions of Solicitors of the Treasury, under
dates of August 10, 1889, and November
15, 1910, cited in the Attorney-General's
Opinion, *supra*, p. 97;

Instructions of the Comptroller of the Cur-
rency, 1920, p. 110;

Instructions of the Comptroller of the Cur-
rency (1909), cited in the Attorney-Gen-
eral's Opinion, *supra*, p. 97;

Pratt's Digest of Federal Banking Laws, 1920
Ed., page 100; and 1922 supplement
thereto, p. 7;

Ruling of Comptroller of the Currency that
national banks have no right to establish
or operate branch banks in Missouri,
see page 46 hereof, and 1922 supplement
to Pratt's 1920 Digest of Federal Banking
Laws, p. 7.

8. Courts recognize the construction placed upon statutes by officers whose duty it is to execute them, especially when such construction has been made by the highest officers in the executive department of the government and has been followed for many years; when, too, such construction is reasonable and of great persuasive force. Similarly, the construction of a statute by the legislature, as indicated by the language of subsequent enactments, is entitled to great weight.

Executive Construction.

36 Cyc 1140;

U. S. v. Cerecedo etc. Compania, 209 U. S. 338;

U. S. v. Finnell, 185 U. S. 236, l. c. 244.

Legislative Construction.

36 Cyc 1142;

U. S. v. Freeman, 3 Howard 556, l. c. 565.

9. The course of conduct of national banks relative to branches, the attitude of Congress relative thereto, and the rulings and attitude of the United States Treasury Department have fixed a positive policy of limitation against branch banks in the United States since 1864. This Court has recognized that policy.

First National Bank v. Hawkins, 174 U. S. 364,
l. c. 369.

10. The State of Missouri has conformed its public policy with respect to branch banking to the declared public policy of the Federal Government and has prohibited state banks from the establishment or operation of branch banks. Similarly, a great many of the states have prohibited the establishment of branches by state banking institutions. (Where branches are permitted in the state it is always by **express** authorization.)

Section 11737, R. S. Mo., 1919.

11. To permit national banks to establish and operate branch banks in those states in which state banks are prohibited from the exercise of a like privilege is to destroy state banks in such states. This Court will not adopt a construction of the law producing such results, if a construction conforming to the hitherto-declared public policy of the federal government and the states is reasonably possible. If a change in the public policy of the government is demanded by changed conditions, it can be effected by Congress in an act excepting from its operation those states where state banks are prohibited from having branch banks.

II.

**THE RIGHT AND DUTY OF MISSOURI TO
SUPPRESS THE USURPATION.**

Branch banking by a national bank is an act of usurpation outside the ambit of its power and authority to rightfully engage in, is non-national bank in character, and a national bank is not acting as such nor was an agency or creature of the federal government when it engages in branch banking.

The attitude of both sovereignties with respect to branch banking being the same, and the act of usurpation of the First National Bank in engaging in unauthorized branch banking in Missouri being non-national bank in character, either sovereignty may properly put a stop to the usurpation.

And particularly may Missouri so act when the ultimate decision rests on appeal, as here, with the Supreme Court of the United States.

McClellan v. Chipman, 164 U. S. 356, 359;
First National Bank v. Fellows, 244 U. S. 416;
American Bank v. Federal Reserve Bank, 256
U. S. 350;
First National Bank v. Commonwealth of Ky.,
143 Ky. 816, 34 L. R. A. (n. s.) 54;
Osborne v. United States Bank, 9 Wheat 737;
Ex parte Young, 209 U. S. 123;
Wilson v. New, 243 U. S. 332;

Hammer v. Dagenhart, 247 U. S. 251;
Griesedieck Bros. Brewery Co. v. Moore, Internal Revenue Collector, 262 Fed. 582;
Kennington v. Palmer, Attorney-General of the United States, 255 U. S. 100;
Missouri v. U. S. Game Warden, 252 U. S. 416;
Guthrie v. Harkness, 199 U. S. 148, 159;
Gilbert v. Minnesota, 254 U. S. 325, 329, 332;
Halter v. Nebraska, 205 U. S. 34;
Hale v. Henkel, 201 U. S. 43, 75.

Quo warranto is the form of remedial writ.

First Nat. Bank v. Fellows, 244 U. S. 416;
Standard Oil Co. v. Missouri, 224 U. S. 270;
Opinion of Missouri Supreme Court in the case at bar, Appendix C hereto.

Missouri courts have jurisdiction.

Herman v. Edwards, 238 U. S. 107;
Currency Act of July 12, 1882, Chap. 290, Sec. 4 (U. S. Comp. Stats. 1916, Sec. 9668);
Sixteenth subdivision, Sec. 24 of Federal Judicial Code;
U. S. R. S., Sec. 5136;
Minneapolis v. Bombolis, 241 U. S. 211, 221-223.

ARGUMENT.

I.

A National Bank Has No Authority to Establish or Operate Branch Banks.

A national bank not only has neither express nor implied authority to establish and operate a branch bank, but it is both expressly and impliedly prohibited from so doing. If other terminology than **branch bank** is preferred, then a national bank has no authority, either express or implied, to conduct its **usual business** at **more than one office or banking house**; on the contrary, that is both expressly and impliedly forbidden. (Despite the obvious shrinking of the plaintiff in error from the term **branch bank** it will not be overlooked that the ultimate fact **charged** in the information and by the demurrer **admitted** is that the plaintiff in error is conducting a **branch bank** with all that that term properly connotes.)

1. That a national bank has only such powers as are expressly conferred upon it by statute and such additional powers as are necessarily incident to those conferred is settled law in this country. As was said

by this Court in **California Bank v. Kennedy**, 167 U. S. 362, 1. c. 366:

“It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established.”

To the same effect is the holding in **Logan County National Bank v. Townsend**, 139 U. S. 67:

“It is undoubtedly true that the national banking act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established.”

2. It is not seriously contended here (although vaguely intimated in the brief of plaintiff in error at page 58 thereof) that a national bank has any express authority to establish or operate a branch bank. (At the bar of the Supreme Court of Missouri it was admitted by plaintiff in error that a national bank had no express power to establish or operate a branch bank, but that the power to establish such a bank

was one of its implied or incidental powers. Moreover, in the memorandum of Mr. Brown, filed by plaintiff in error with the Supreme Court of Missouri and referred to in the brief of plaintiff in error at page 75, which memorandum concludes that branch banks are authorized, it is admitted that the power to establish branch banks is not expressly conferred, but it is contended that it is one of the implied powers of national banks.) However, whether the contention is or is not made that a national bank has the express power to establish or operate a branch bank, the slightest reference to the statutes themselves will at once dispose of that matter.

3. The statute (Sec. 5136) vests national banks with:

“All such incidental powers as shall be necessary to carry on the business of banking.”

The contention of the plaintiff in error is that the power to establish and operate branch banks is such an incidental power as is necessary to carry on the business of banking.

If the word “necessary,” as used in this statute, is taken in its ordinary meaning as that which is essential or indispensable to the end aimed at, then it needs no argument to show that branch banks are not “necessary” to the business of conducting a

national bank or to the business of conducting a bank of any character. The Court will take judicial notice of the fact that the vast majority of national and state banks are conducted without branch banks, from which fact it is obvious that branch banks are not essential or indispensable to the banking business.

If, however, the word "necessary" is to be construed here, as probably it should be, as meaning not that which is indispensable, but that which is peculiarly suitable and immediately appropriate to the end aimed at, and if, accordingly, the statute is read as if it conferred upon national banks all incidental powers peculiarly suitable or immediately appropriate to the business of banking, still the conclusion is inevitable that a national bank does not have the right to maintain branch banks.

A national bank is more than a mere private institution. It is a quasi public institution. One of the essential purposes of the laws permitting the incorporation of national banks and regulating them, as well as of all banking laws, whether state or national, is to secure safety to the depositors and the public generally and to protect the interests of the government, which, to a certain extent, utilizes national banks as its agencies. In determining whether a given power is peculiarly suitable or immediately appropriate to the banking business, not only the interests of the stockholders of the bank are to be con-

sidered, but the interests of the depositors and of the public generally. If branch banking is not peculiarly suitable or immediately appropriate to the national banking business, **safely conducted with a primary regard to the interests of its depositors and of the public**, then it is not such an incidental power as is necessary to the banking business. That branch banking is not safe banking is conceded by all authorities that have spoken on that subject. **All such agree, therefore, that a national bank has no implied power to conduct branch banks.**

On May 11, 1911, Attorney-General Wickersham rendered the official opinion of the Department of Justice to the Secretary of the Treasury, in response to the request of the latter for an opinion as to the right of the Lowry National Bank of Atlanta, Georgia, to establish "another office or banking house in that city." In that opinion the Attorney-General arrived at the following conclusion (Opinions of Attorneys-General, 81, l. c. 98), **set out in full in Appendix A herein**):

"A national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization."

While the Attorney-General based his conclusion upon several grounds, others of which are to be

noticed hereafter, one of them was that **a national bank has no implied power to establish a branch bank.** After quoting the statute he said:

“Clearly, neither of these provisions contain an express or **necessarily** implied power to establish a branch bank. * * * The power to establish a branch bank **is certainly in no respect essential** to the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidences of debt, or of exercising either or any of the incidental powers named in the statute, or of any power which is incident to the carrying on of a general banking business.”

In this opinion the Attorney-General cites and refers to two opinions, one rendered by the Solicitor of Treasury on August 10, 1889, and one rendered by the Solicitor of Treasury on November 15, 1910, **both holding that the power to establish branch banks was not one of the incidental or implied powers of a national bank.**

In the opinion of the Supreme Court of Missouri in the present case (Tr. of Rec., p. 10; **set out in full in Appendix C herein**) that Court, after dealing fully with the question as to whether a national bank had the incidental power to establish and operate branch banks, arrives at the following conclusion:

“The apparent purpose of the establishment of branch banks is to multiply the places of busi-

ness of the principal bank and thereby increase the volume of same. As a manifestation of commercial progress, the effort may well be commended. That phase of the matter, however, is not under consideration. It is a question of power and not progress that demands solution. **Certainly it is in no sense essential to the exercise of any of the powers granted nor is it a necessary incident to the carrying on of the banking business within the meaning of the statute. * * *** The sections of the act reviewed (The National Bank Act) lend no countenance to the contention that the establishment of branch banks is within the scope and purview of these sections and hence not within the law. * * * We have held that the carrying on of the banking business did not require the establishment of branch banks and hence that it was not within the terms of the statute."

The most complete refutation of the doctrine of implied or incidental power to establish and operate branch banks to be found anywhere is contained in the opinion of the Supreme Court of Kentucky in the case of **Bruner v. Citizens Bank, 134 Ky. 283**. The argument of the Kentucky court is exactly applicable here. The Court said, l. c. 290:

"In this connection the argument is made that, as the statute does not forbid the establishment of branches or make any mention of the matter, it follows that banks should be allowed the same

privileges as other business corporations created under the statute; and, as other business corporations have the authority by implication as a power incident to their business to set up as many branches as they like, so should banks enjoy this privilege. The statute does not in terms authorize commercial or manufacturing corporations to have branch places of business, nor does it deny them this right. The statute is silent upon this subject, both as to banks as well as all other corporations; but it is a matter of common knowledge that all large commercial and manufacturing corporations do have branch places of business, many of them in other states than the home of the corporation, and that at these branches they carry on business in the same way as they do at their main or principal office or place of business. And the right to thus carry on a legitimate business by a corporation duly organized has never so far as we are aware been questioned. It would seem, therefore, that, if banks are to be denied privileges in this respect that are enjoyed by other corporations, some good reason should be advanced to support the discrimination. **That there is sound reason for this discrimination, we think, can be demonstrated.** Primarily it grows out of the peculiar nature of the banking business, and is supported by a fair construction of the statute and by a sound public policy. Banks are quasi public corporations. They may only be organized in such manner and do such things as the state in which they carry on business permits them to do; and

in carrying out its policy the state has surrounded banking privileges with many wholesome restraints that are not applied to ordinary corporations. This is manifested in the various sections of the statute relating to corporations and banks. (There follows here a statement of the regulations thrown around banks as distinguished from those thrown around ordinary corporations.)

“From these general but important distinctions that the Legislature has made between banks and corporations generally, it is apparent that banks cannot be allowed to exercise any functions that are not strictly authorized by law. What a mercantile corporation may do is not the standard by which to measure the powers of a banking institution. They occupy towards the public a very different relation. The number of branches or places of business that the mercantile corporation may establish, concerns no one except the stockholders and the creditors of the corporation. The public generally have no interest in its business nor any right to control or direct its affairs. But the whole body of the public is directly interested in the conduct and management of banking institutions because they are depositories in which is kept practically all the money of the country; and it is with the money so deposited that banks are enabled to successfully carry on a profitable business. * * *

The loss occasioned by the failure of a private corporation is generally confined to the stockholders and creditors, while the failure of a

bank brings ruin and disaster to the hundreds and often thousands of people who have placed with it on deposit their earnings, and it is to secure this depositing public from loss that the state through its agencies exercises a supervisory care over banking institutions. To extend by implication the powers of a bank by allowing it to exercise privileges not necessary to carry on the business would be to increase the probability of loss to the public by its mismanagement or failure. While we are not disposed in anywise to curtail the powers essential to the proper conduct of the business, it does not seem to us that the establishment of branches is either prudent or necessary. **Looking at the matter from a business standpoint, it is important that a bank should only have one place of business.** The management and safe investment of money requires constant and painstaking care and attention, as well as sound and discriminating judgment on the part of the officers of a bank. * * * But, if branches were established, they must in the necessity of things be left almost exclusively to the persons immediately in charge, free from the influence and presence of the officers and directors, and this practice would not in our judgment be conducive to safe and conservative banking methods. * * *

“If branches were necessary to enable banks to carry on their business, we would not be disposed to interfere with their establishment; but this feature of the case does not present any difficulty, because it cannot be said that branches

are necessary to enable a banking institution to fulfill the purposes of its creation, although they might widen the field of its opportunities and increase its capacity to earn money for its stockholders. But neither the prospect of advantage to the stockholders nor the convenience to the community in which the branch is located should be allowed to have much weight in determining the wisdom or advisability of their existence. The important consideration is the security of the public, and **that the public will be better protected by not allowing banks to establish branches we have little doubt.** This matter of branch banks by implication or as an incident to the power to carry on a banking business is a comparatively new feature that has been introduced in some banking circles, and is a departure from the rule that has obtained in this state from the beginning. When banks were incorporated under special laws, it was not unusual for the Legislature to give them by express authority the right to establish branches; and, under the authority so granted, several branches were in operation when the present general law upon the subject of banking was enacted, but when the Legislature came to enact this general law under which all state banks have their existence and from which they derive all their powers, it omitted all reference to branch banks, although it must have been within the knowledge of practically all the members of the General Assembly that branch banks were being conducted under special acts. **The fact that no provision was made in the general law for branch**

banks is significant as illustrating that it was not the purpose or policy of the state to further encourage or permit them. If the General Assembly had deemed it wise to permit banks to establish branches, it would have so declared, and the failure to speak on so important a subject furnishes strong reason why **this privilege not necessary to the enjoyment of the powers conferred by the statute and the charters obtained thereunder should not be conferred by implication.**" (Note. An exact parallel exists between the situation here discussed and that in connection with the National Bank Act.) "In addition to this, when the Legislature fixed the amount of capital stock that a bank must have before commencing business, graded in some respects according to the population and needs of the community where the bank was to be located, it was certainly not contemplated or intended that upon this capital designed to be employed in one locality a bank might set up an unlimited number of branches and do a volume of business upon money received from depositors in widely separate communities entirely disproportionate to the capital invested. The capital stock of a bank and the double liability of the stockholders is the security to which depositors must look for the protection of their deposits and to permit a bank with a capital of say \$15,000 to have a number of branches doing a general banking business would greatly lessen the security of the depositors, and at the same time increase the probability of loss. It seems to us

that, if branch banks are to be allowed, there should be set apart for the use and benefit of each branch not less than the amount of capital stock required in the organization of banks, and this was the policy pursued by the Legislature in permitting banks incorporated under special acts to have branches at different places in the state. But the scheme under which it is insisted that the Citizens' Bank of Shelbyville and other institutions may establish branches does not contemplate or provide that there shall be any increase in the capital stock; the argument being that, when a bank is organized with the capital required by law for the conduct of the banking business in the place at which it is proposed to locate the bank, it may without any increase in its capital set up as many branches as it chooses, and where it pleases, and at these various places do a general banking business without any capital set apart for the purpose, although each of these branches is in itself virtually a distinct and complete banking institution, exercising and enjoying all the powers and privileges conferred upon chartered banks, and yet free from the duties and obligations imposed by law upon incorporated institutions. **We cannot give our assent to a scheme like this."**

To similar effect is the holding of the Supreme Court of North Carolina in the case of **Morehead Banking Company v. Tate**, 122 N. Car. 313. So, also,

to the same effect are all of the text writers. We cite the following:

Magee on Banks and Banking (2nd Ed.), 1913,
pp. 42-45;
Pratt's Digest of Federal Banking Laws, 1920
Ed., p. 110, and 1922 Sup. thereto, p. 7;
Morse on Banks and Banking, Sec. 16;
I Morawetz on Corporations, Sec. 387;
Zane on Banks and Banking, Sec. 24.

Plaintiff in error contends that the power to establish and operate branch banks is essential and necessary to the business of banking. This contention it makes notwithstanding that **every official opinion that has been rendered, dealing with the subject, every judicial decision passing on the matter of branch banks, and every text writer discussing powers of banks in this connection, without a single exception, hold that the power to establish and operate branch banks is neither necessary, essential nor suitable to the business of banking, safely conducted.**

There is not one official opinion, either executive or judicial, nor a single recognized authority on banking agreeing with the position here taken by the plaintiff in error.

The very last official declaration upon the subject of the suitableness of branch banking is that of the Comptroller of the Currency made on the 15th day of

August, 1922 (set out in full in the brief of the Attorney-General filed in this case in the Supreme Court of Missouri, its authenticity unquestioned then or since by plaintiff in error):

"If it had been my duty to make the laws of the various states of the Union, I should not have permitted branch banking."

4. Not only has a national bank no express or implied authority to establish and operate a branch bank, but it is **expressly** restricted by the statute to a single banking house. Section 5190 (U. S. R. S.) reads:

"The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."

Plaintiff in error contends that this section does not restrict a national bank to a single banking house. An Attorney-General of the United States, two solicitors of the Treasury, the United States District Court for the Southern District of Ohio, the Supreme Court of Missouri, and the text writers have all agreed that **this section does restrict a national bank to a single banking house and, therefore, prohibits branch banking.**

Attorney-General Wickersham, in the opinion cited, *supra*, said on this point (29 Opinions Attorney-General 81, l. c. 92, 98):

“ * * * If there were any provision elsewhere in the national banking laws which clearly implied that such authority existed, by subtle process of reason, this section could be construed to be consistent therewith. But in the absence of such language elsewhere in the act, and in view of the general principle that banks cannot establish branches unless the power to do so is granted, it appears to me that the natural meaning of this section is that the general banking business of a national bank must be conducted in **one** office or banking house, within the place designated in its organization certificate.

* * * * *

“Section 5190, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association certificate of organization.”

In his opinion rendered on August 10, 1889 (set out in *Magee on Banks and Banking*, 2nd Ed., p. 44), Mr. Hepburn, Solicitor of the Treasury, construing this section, said:

“This section (5190, U. S. R. S.) contemplates that the usual business of a national banking association shall be transacted at one office or

banking house, and as receiving deposits and paying checks belonging to the 'usual business of the bank,' I am of the opinion that the statute does not authorize the establishment of an auxiliary cash room in a different part of the city for the purpose proposed. Besides, it may be observed, that if a national banking association can lawfully establish and maintain a separate office for receiving deposits and paying checks it could as well establish as many auxiliary cash rooms in the city of its corporate residence as its business might require; and indeed, the entire business of the bank may be parceled out and conducted in the same way all over the city."

The District Court of the United States for the Southern District of Ohio in **Armstrong v. Second National Bank**, 38 Fed. Rep. 883, construing this section, said:

"Under this section (5190) it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than its office or banking house."

The Supreme Court of Missouri in the present case (Tr. of Rec., p. 9), construing this section, said:

"The purpose of section 5190 is not for the information of the comptroller, it being a matter with which he has no concern when he has

granted the articles as to where the place of the business shall be located within the county, city or town. This is a matter to be determined by the board of directors in establishing the business. To render their act specific it must be confined to the terms of the statute, viz.: to 'an office or banking house within the county, city or town' named in the articles. This location having been established, it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words 'an office or banking house' cease to be specific, and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. **Such a construction finds no resting place in reason. If followed it would, instead of centralizing and rendering more stable the powers of a bank, enable it, by multiplying its places of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. Such an effect was certainly never contemplated by the banking act."**

See, also, Pratt's Digest of Federal Banking Laws, 1920 Ed., p. 100.

But if we did not have the aid of the authorities just quoted, still there would be no possibility of arriving at any other conclusion than that section 5190 restricts national banks to a single banking house for the transaction of their "usual business." They

must transact their usual business at "an office or banking house." Certainly the usual meaning of the word "an" is **one**.

Funk and Wagnall's New Standard Dictionary defines the words: "a"—"an" as follows:

" 'a'—one; any; some; each; expressing singleness, unity, etc.; more or less indefinite.

" 'an'—one, or any, when not emphasized used like the article 'a'."

Webster's New International Dictionary defines the word "an" as follows:

" 'an'—one or any; without special emphasis on the number. It is used before nouns in the singular number denoting an individual object."

The definition of "an" in Corpus Juris (2 C. J., page 332) is as follows:

"The word 'an' originally meant one. It is seldom used to denote plurality."

Black's Law Dictionary, 2nd Ed., page 67, defines the word "an" as follows:

"In statutes and other legal documents it is equivalent to 'one' or 'any'. It is seldom used to denote plurality."

Among the judicial decisions holding that the articles "a" and "an" indicate the singular we cite the following:

- Hastings v. Brown, 1 El. & Bl. 451, l. c. 454,
118 Eng. Rep. Full Reprint, 505, l. c. 506;
Moyahan v. City of New York, 205 N. Y. 181;
People v. Ogden, 8 Appellate Div. 464, l. c. 467
—40 N. Y. Supplement 827;
Wastl v. Montana Union Ry. Co., 61 Pac. 9,
l. c. 15;
Wades v. Figgatt et al., 75 Va. 575, l. c. 582.

It is the context, however, in which the article "an" is used in section 5190 that makes it certain that it is there used in its original sense as meaning "one." The section does not say "an office **or** offices," nor does it say "a banking house **or** banking houses." It says, "an office **or** banking house," using the singular noun as well as the singular adjective. Moreover, it says "usual business," employing here also the singular, implying an indivisible entity, something that naturally would be confined to a single **place** of business.

The theory of plaintiff in error that the purpose of Congress in enacting section 5190 was to insure the carrying on the business of a national bank in "an office or banking house" rather than upon **the curb or under somebody's hat or hoopskirt** (see brief of plaintiff in error, page 68) must assume that Con-

gress deemed it necessary to legislate to prevent such a method of carrying on the banking business. **But when, in the long history of banking, was that business carried on otherwise than within an office or banking house? Did Congress solemnly legislate to prevent an evil which never existed?** On the other hand, branch banking was a real and existing evil at the time of the enactment of the National Bank Act. What was more natural and reasonable than that Congress, in 1863, to prevent that evil in the national banking system, should have, as it did, expressly restricted the banking business to a single office or banking house?

5. The very absence from the National Banking Act of an express permission of branch banks amounts to an **implied prohibition of the power to establish them.**

We do not mean to say, of course, that the mere absence of express recognition of any implied power amounts to an implied prohibition thereof (such a contention could not be reconciled with the doctrine of implied or incidental powers), **but we do say that the absence of express recognition of a power of such magnitude and importance as that of establishing, maintaining and operating branch banks does amount to an implied prohibition.**

In **California Bank v. Kennedy**, 167 U. S. 362, l. c. 366, wherein it was contended that a national bank

had the implied power to acquire stock in another corporation, this Court said:

“It is clear, however, that a national bank does not possess the power to deal in stocks. **The prohibition is implied from the failure to grant the power.**”

And in **First National Bank v. National Exchange Bank**, 92 U. S. 122, l. c. 127, dealing with the same question, this Court said:

“Dealing in stocks is not expressly prohibited, but **such prohibition is implied from the failure to grant the power.**”

The power sought here by the first National Bank is not to do something that is properly incidental to any of the express and essential powers granted to national banks, but the power to conduct several general banking businesses in the same city. It has authority to conduct a general banking business in the City of St. Louis. To conduct a **second** general banking business is not in any true sense **incidental** to the conducting of a general banking business. What is asked for is **of the same importance** as the principal power granted, rather than something merely **incidental** thereto. It is not possible that Congress intended that a power of such importance could be

evolved from powers incidental to the general powers expressly conferred.

At the time of the adoption of the present National Bank Act (1863), branch banking, although unusual and regarded with disfavor, was well known. Branch banks had been expressly permitted under the first United States Bank Act and under the second National Bank Act. Moreover, at the time of the adoption of the present (or third) National Bank Act, state branch banks were permitted by express statutory authority under carefully prescribed regulations in a number of states. Branch banking and its corollary, the centralization of banking power, was a subject of bitter controversy. Under such circumstances, the failure to expressly grant the power to establish branch banks amounts to an implied prohibition. That is particularly true in view of the further fact that the National Bank Act makes no provision whatever for regulating branch banks, their number, location, etc., the amount of capital to be prorated to each, or the method and manner of conducting them. As Attorney-General Wickersham put this matter in his opinion cited, *supra*:

“In a branch bank bills of exchange are negotiated and discounted; moneys received for deposit; exchange, coin and bullion are bought and sold; money is loaned, and every kind of banking business that is authorized is there trans-

acted, unless it be the issuing and circulating of bank notes. In proportion to the amount of business transacted, the same capital is required to run the branch bank as to operate the parent bank. In the city of Atlanta no national bank can be organized for a less capital than \$200,000; and if a national bank in that city, having a capital stock of \$200,000, should establish a branch bank therein, **the practical result would be that two banks would be in operation on a capital upon which only one bank is authorized to do business in that city; and each additional bank would, of course, constitute a further division of the capital in violation of the spirit of this section of the statute.**

“Furthermore, I have carefully examined the national banking laws, and **I fail to find any provision which empowers the comptroller to restrain or to regulate in any manner the conduct of a national bank with reference to the establishment and maintenance of branch banks.** He is authorized and directed to approve of the name assumed by the association (Sec. 5134, Rev. Stat., par. 1); when notified that 50 per cent of the capital stock has been paid in, and the laws have otherwise been complied with, he is required to examine into the condition of the association, the name and place of residence of its directors, the amount of capital stock of which each is the owner in good faith, and whether such association has complied with all the provisions of the act, and shall cause a proper statement to be attested by oath of a majority of its directors

and the president and cashier; and, if after such examination it appears that the association is lawfully entitled to commence the business of banking, it is his duty to issue a proper certificate to that effect (Secs. 5168 and 5169, Rev. Stats.); he is required to approve the increase of capital stock (Act of May 1, 1886, Sec. 1; Sec. 5142, Rev. Stat.), and also the decrease of the capital stock (Sec. 5143, Rev. Stat.); he can, at his discretion, extend the corporate existence of the association (Act of July 12, 1882, Sec. 9; 22 Stat. 162); he must approve reserve agents of the association (Secs. 5192 and 5195, Rev. Stat.); he is required to give notice to an association that is short in reserve funds (Sec. 5192, Rev. Stat.); he must approve the change of name and location of a bank (Act of May 1, 1886, Sec. 2; 24 Stat. 18) and shall also approve of the conversion of state banks into national banks (Sec. 5154, Rev. Stat.); but **there is no provision directing or authorizing him to exercise any power whatever with reference to the location of a branch bank or the terms and conditions upon which such a branch bank may be established and maintained.**

“Can it be supposed that if Congress intended to authorize the establishment of branches by national banks, no restraint whatever would have been thrown around the exercise of such power, and that the comptroller, who in all other respects is given such ample power of control over the existence and conduct of banks, would not have been vested with some power or control

over the location of such branches and the manner in which the same should be established and conducted?

"If, under the laws as they now exist, a national bank has the power to establish a branch, the exercise of that power is entirely within the discretion of the board of directors of the association, and it may be exercised without any restraint whatever; and the Lowry National Bank can establish not only one branch in the city of Atlanta, but any number of branches, without consultation with the comptroller with reference thereto. Such an unrestrained power, it appears to me, would be fraught with the most serious danger and would result in an inflation of banking business upon insufficient capital, and in an inadequate means of supervision and control over a bank's business by the chief officials in authority, which in all probability would bring disaster to the welfare and reputation of the national banking system."

6. What has been shown by the foregoing considerations to be the only possible and reasonable construction of the United States statutes relative to the power of national banks in connection with branch banking has been also the uniform construction placed upon the National Banking Act by the legislative branch of the government—the Congress, and by that department of the Federal Government whose duty it is to enforce the National Banking Act,

namely, the Treasury Department, and, within that department, the Comptroller of the Currency.

That legislative and executive construction is of compelling force has always been recognized by this Court. As to legislative construction, the rule is thus stated in 36 Cyc 1142:

“A construction of a statute by the legislature, as indicated by the language of subsequent enactments, is entitled to great weight.”

As the rule was stated by this Court in **United States v. Freeman, 3 Howard 556, 1. c. 564:**

“If it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.”

The rule as to the force of executive construction is equally well settled. As stated in 36 Cyc 1140:

“The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous.”

In **United States v. Cerecedo etc. v. Compania**, 209 U. S. 338, it was said that:

“When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution” (Robertson v. Downing, 127 U. S. 607; United States v. Healy, 160 U. S. 736).

And in **United States v. Finnell**, 185 U. S. 236, 1. c. 244, the same rule is stated as follows:

“Of course, if the departmental construction of the statute in question were obvious or clearly wrong, it would be the duty of the court to so adjudge; * * * but if there simply be doubt as to the soundness of that construction * * * the action during many years of the department charged with the execution of the statute would be respected and not overruled except for cogent reasons.”

Now on three separate occasions subsequently to the original enactment of the National Banking Act Congress, under unusual circumstances, has specifically authorized national banks to establish branch banks. This was done when an act was passed enabling state banks having branches under express authorization of state laws to retain such branches (but not to establish others) upon their conversion to national banks (Section 5155, R. S. U. S.). It was done again in an

act approved May 12, 1892, authorizing national banks to open branch banks within the exposition grounds at the Chicago Exposition. It was done again by a similar act approved March 3, 1901, in connection with the Louisiana Purchase Exposition. None of these acts were necessary if national banks had the right, without such express authorization, to establish and operate branch banks. The enactment of such special acts, as Attorney-General Wickersham pointed out in his opinion, cited *supra*, was unnecessary "if the power existed for national banks to have branches." Here was a clear recognition by Congress of the absence of such power in national banks generally.

The consistent construction placed by the Treasury Department, which is charged with the execution of the National Banking Act, has been that national banks could not establish branch banks. The earliest recorded declaration upon that subject is the opinion of the Solicitor for the Treasury, under date of August 10, 1889. That was followed by an opinion of the Solicitor of the Treasury, under date of November 15, 1910, and by the opinion of the Attorney-General of the United States, rendered to the Secretary of the Treasury, under date of May 11, 1911. The instructions of the Comptroller of the Treasury have uniformly carried that construction. For example, in the instructions of the Comptroller,

issued in 1909, and cited in the Attorney-General's opinion, *supra*, at page 97, was the following:

“The word ‘place’ and ‘at an office or banking house’ (as used in section 5190) **have always been construed by the comptroller to mean the legal domicile of the corporation, of which it can have but one.**”

In 1920 in the last available printed instructions of the Comptroller of the Currency (see instructions of the Comptroller of the Currency relative to organization and powers of national banks, 1920, pages 110-112, inclusive) **the same construction of the United States statutes is continued and fully explained and elaborated. We have set out these official instructions of the Comptroller in full in Appendix B hereof.**

On the 15th day of August, 1922, the Comptroller of the Currency issued this statement:

“I have particularly ruled in every instance that no branch office or agency would be authorized by me in states where state institutions would not have like facilities. It ought to be clear and it is fair, and there is no reason for anybody misunderstanding it. I have, on the other hand, permitted national banks in large cities of states that permit state banks and trust companies to have agencies or offices, the privilege to have like agencies or offices. If it

had been my duty to make the laws of the various states of the Union, I would not have permitted branch banking.”

In Pratt’s Digest of Federal Banking Laws, a recognized authority on national banks, 1920 edition, page 100, it is said:

“It is settled beyond doubt that a national bank, independently of the National Bank Act, is not, under its charter, authorized to establish a branch bank for the purpose of carrying on a general banking business in the place designated in its certificate of organization, or anywhere in the United States; and, furthermore, that Section 5190, U. S. R. S., properly construed, restricts the carrying on of a general banking business by a national bank to **one** office or banking house in the place designated in the association’s certificate of organization, except in so far as that section is amended by Section 25 of the Federal Reserve Act, which permits foreign branches under certain conditions.”

In the 1922 Supplement to Pratt’s Digest of Federal Banking Laws, 1920 edition, which supplement contains all amendments and new rules and regulations to **November 1, 1922**, it is said (p. 7, sec. 7):

“Additional Offices of National Banks.—Note to Sec. 109, page 100, Pratt’s Digest, 1920.

“The Comptroller of the Currency is permitting national banks located in large cities in

states where state banks or trust companies have offices, agencies or branch banks to establish additional offices in the same city where their principal office is located. Each case will be considered on its merits and applicants should show conclusively competition for state institutions, with branches, and the need for additional offices in order to meet such competition.

“A showing should be made also as to the necessity for an office in the locality where it is proposed to locate.

“The following quotation from a recent letter of Comptroller of the Currency Crissinger to Senator McCormick, sets forth the Comptroller's position in this matter:

“ ‘I am not authorizing the establishment of branch banks, but have been permitting national banks in states where state banks and trust companies have offices, agencies or branch banks to establish additional offices in some of the large cities where it is necessary to meet the competition of state banks that have literally taken possession of cities with branch banks or offices, and these facts are notorious and are well known to all state bankers of the country.’ ”

If the foregoing evidences, covering a period exceeding thirty years, do not show a uniform and consistent and settled departmental construction, it is difficult to conceive how such a departmental con-

struction is to be established. Not a single instance of a contrary ruling under circumstances such as the present, affecting a national bank in a state where state banks are denied the privilege of having branches, has been or can be shown. **It is noticeable that the plaintiff in error does not claim to have obtained, and it did not obtain, authorization from the Comptroller of the Currency to establish any branch bank.** It acted in defiance of the established construction placed upon the law by the federal government, in defiance of the rulings of the Department of Justice, the Secretary of the Treasury and the Comptroller of the Currency; in short in defiance of the laws of the United States as construed by those charged with their enforcement. It dared to play the outlaw, alike contemptuous of the welfare and rights of all other banks whatsoever in St. Louis, of the laws of the state of its domicile and of the sovereignty whose sanctity it now so anxiously undertakes to protect.

Plaintiff in error seeks to weaken the contention that there has been a settled departmental construction of the National Banking Act adverse to its claims (see p. 75 of the brief of plaintiff in error) by pointing to what it denominates an opinion written by Mr. Wrisley Brown, at one time a special assistant to the Attorney-General. It is noticeable, however, that no citation is given in connection with

that statement. It was not an official opinion. It was a memorandum prepared for the Attorney-General and presumably rejected by him. It is somewhat far-fetched to argue that such a rejected memorandum lessens the force of the official opinion actually rendered by Attorney-General Wickersham or makes the ultimate conclusion of the Department of Justice less indicative of departmental construction.

It is indeed true that a departmental construction is not conclusive even when, as here, it is buttressed and reinforced by manifold other arguments, but we have no doubt that it will take more to overcome it than the belated discovery of a hitherto hidden and unsuspected incidental power.

7. The course of conduct of national banks relative to branches, the attitude of Congress relative thereto, and the rulings and attitude of the Treasury Department have fixed a positive policy of limitation against branch banks in the United States since 1863. That policy has been recognized by this Court. In **First National Bank v. Hawkins**, 174 U. S. 364, 1. c. 369, the Court said:

“Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and busi-

ness men deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. **The smaller banks, in such a case, would be in fact, though not in form, branches of the larger one."**

This case, it is true, was not dealing directly with the question of branch banks. It recognizes, however, that the policy of the national banking law is directly against the evil of concentration of the banking business of one community in a single concern which would be the inevitable result of a permission of branch banking and it characterizes whatever is in fact branch banking, even though it may not be so in form, **as hostile to the policy of the national banking law.**

The policy of the national banking law against branch banking has been recognized and followed by the State of Missouri and many others in the adoption of state laws prohibiting state banks from establishing and operating branch banks. What consideration could now justify the overturning of a national policy so long and so firmly established and so well recognized, and the consequent certain destruction of state banks in those states which prohibit branch

banks? If it be true, as is contended by plaintiff in error here, that national banks are at a disadvantage in those states in which branch banks are permitted, or, if it be true, that changing economic conditions demand an alteration in the policy of the nation in this respect, is not the equitable and just course to be pursued that of appealing to Congress for an alteration in the law, such as will at the same time protect the interests of national banks and secure from annihilation the state banks?

It appears there is no lawful authority from the nation for a national bank to open or operate branch banks in any state. Further, the opening and operating of branch banks is prohibited by section 5190.

The unlawful branch banking here involved is conducted by the bank in Missouri.

Missouri, in 1915, after the Federal Reserve Act of 1913, set to work to frame and did frame a banking act believed for safety at least the equal of the banking laws of any state in the Union. The laws, in passing, were framed to permit of state banks availing themselves of membership in the federal reserve system, and to that end the laws were frank copies in many respects of the National Bank Act.

The United States had had, under the 1791-1811 United States Bank Act and under the 1816-1836 Second United States Bank Act, experience with a

mother bank located under the first law at Philadelphia and under the second at Washington, and with branch banks at various other cities in the United States.

States in imitation had adopted the branch bank scheme.

The branch bank scheme represented in its essence centralization of banking power.

The working of branch banks had not proved popular either in nation or states. The great Central West resented the whole notion.

The Second United States Bank was not rechartered in 1836.

National branch banking then ended.

When the present National Bank Act was framed, therefore, the plan was for decentralized banks, each individually independent of the others.

As has been shown, there was no authority for branch banks and branch banking was by section 5190 prohibited.

Missouri had had branch banks. She gave up that system, too.

The present Missouri sections covering the question in hand are Sections 11684 and 11737, R. S. Mo. 1919.

Section 11684, Revised Statutes of Missouri of 1919,

referred to by the Missouri Supreme Court, is as follows:

“Sec. 11684. **Prohibition of Banking Business.**
—No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler’s check, money order or otherwise (Laws 1915, p. 108).”

The section of Revised Statutes of Missouri 1919, prohibiting branch banks is as follows:

“Sec. 11737. **Rights and Powers.**—Every such corporation shall be authorized and empowered:

“1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing in-

terest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and non-negotiable papers of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest; **provided, however, that no bank shall maintain in this state a branch bank** or receive deposits or pay checks except in its own banking house."

The Missouri Supreme Court, in the case at bar holds these sections prohibit the character of branch banking here involved.

The act of the First National Bank in engaging in branch banking in St. Louis, Missouri, is an act outside the bounds of the bank's authorized activities, and is, in addition, an act prohibited by the United States Revised Statutes, Section 5190. Branch banking is likewise an act prohibited under the laws of Missouri.

II.

The Right and Duty of Missouri to Suppress the Usurpation.

Branch banking by a national bank as an act of usurpation outside the ambit of its power and authority to rightfully engage in, is non-national bank in character, and a national bank is not acting as such nor as an agency or creature of the Federal Government when it engages in branch banking.

The attitude of both sovereignties with respect to branch banking being the same, and the act of usurpation of the First National Bank in engaging in unauthorized branch banking in Missouri being non-national bank in character, either sovereignty may properly put a stop to the usurpation.

And particularly may Missouri so act when the ultimate decision rests on appeal, as here, with the Supreme Court of the United States.

(1) Has a national bank the right to engage in branch banking at any place in any state, and particularly in Missouri, which prohibits branch banking?

(2) If not (as it has been shown it has not), then can and should the unauthorized, prohibited, non-national bank, branch banking operations of the First National Bank in the State of Missouri, against

Missouri, against its welfare and its banking system be suppressed by either the United States or Missouri, or does the right and duty to suppress this unwarranted "warfare upon legitimate creations of the state" rest, as contended by the bank, with the nation alone?

The contention of the bank is in effect that a national bank may do anything in the state of its location that Congress could give it the right to do; that Congress has the power to permit the bank to engage in branch banking, and that even though Congress has not granted national banks the power to have branch banks, still it could have granted such power and therefore a state cannot interfere with the ungranted "grantable" power of engaging in branch banking.

No authorities are cited to support the proposition.

Must Missouri remain content while this bank makes unwarranted warfare on the legitimate institutions of Missouri and supinely wait for the action of a Federal Comptroller of the Currency that for nearly a year has failed to materialize, though the Comptroller has recognized, and in public statements, that the action of the bank was without warrant or authority or, on the other hand, may Missouri through her officers act in the interest of both nation

and state to suppress the unwarranted usurpation against both?

It is true that in the Van Reed case (198 U. S. 554) this Court said:

“National banks are quasi public institutions and **for the purpose for which they are instituted** are **national** in their character, and **within constitutional limits** are subject to the control of Congress and are not to be interfered with by state, legislative or judicial action, except so far as the law-making power of the government may permit.”

If, as here, the operations of a national bank are **not** national in their character and the national bank acts not within but outside of constitutional limits, or otherwise outside the the scope of its constitutional authority, and acts within the territory of the state, then such bank appears subject to the control of the state within the rule as above stated in the **Van Reed** case.

The same idea is in **McClellan v. Chipman**, 164 U. S., 1. c. 356-359:

“First. National banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their

acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional (*National Bank v. Commonwealth*, 9 Wall. 362).

“Second. National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, **whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislature or impairs the efficiencies to discharge the duties for the performance of which they were created** (*Davis v. Elmira Savings Bank*, 161 U. S. 275, 283).”

The Court will understand that the purpose of the information filed in this case is not to deprive the bank of any right granted to it by the laws of the United States nor to affect any of its legitimate operations in Missouri. Nor is the information in any sense against the life of respondent or any of its legitimate activities anywhere. The information charges respondent with setting up and operating a branch bank and with threatening to open and operate many

more like institutions without warrant, without authority, and against the laws of the nation and the state. As to the establishment and operation of branch banks, respondent is without authority from any source whatsoever, and the establishment, therefore, of such institutions is a corporate usurpation of authority and an illegal invasion of the rights of the state and of the government, and such operations are not bank operations under the law.

In the case of **First National Bank v. Fellows, 244 U. S. 416**, it appeared that Congress had granted national banks the power to act as trust companies when such operation would not be in contravention of local or state law; and that in pursuance of this authority the Federal Reserve Board had granted a permit to a national bank in Michigan to act as a trust company. In this condition of affairs the Attorney-General of the State of Michigan, by quo warranto from the Supreme Court of Michigan, questioned the right of a national bank operating in Michigan to act as a trust company under such federal law and under such permit from the Federal Reserve Board. The Michigan Supreme Court held that the act of Congress giving such authority to national banks was unconstitutional and, therefore, held that the national bank in Michigan could not there operate as a trust company.

The Supreme Court of the United States first considered the question of whether the Supreme Court of Michigan had jurisdiction to determine whether or not the act of Congress was constitutional. The Supreme Court of the United States determined that the Supreme Court of Michigan did have such jurisdiction. It upheld the jurisdiction of the Supreme Court of Michigan on two grounds: First, because the act of Congress granting authority to a national bank to act as a trust company provided that the permit should be given "when not in contravention of local or state law"; and, second, the jurisdiction of the Michigan Supreme Court was upheld because of the fact that such controversies were by federal statute properly referable to state courts.

The case at bar is a much stronger case for state jurisdiction than the Fellows case.

It will be noted here that the Supreme Court of Michigan was recognized as having jurisdiction to determine the constitutionality of a federal law granting authority to a national bank. In the case at bar the Missouri Supreme Court was not called on to declare any act of Congress to be invalid or illegal, but was called on to uphold and enforce the national law and the national public policy, both of which are in exact accord with the law of Missouri and the settled public policy of Missouri. Certainly, therefore, in the instant case Missouri should have the

right to prevent the bank from violating both national and state law by conduct in opposition to the public policy of both nation and state. And this Court in that case held Section 13-K of the Federal Reserve Act authorizing the Federal Reserve Board to grant national banks the power to act in fiduciary capacities was constitutional **because such power was necessary to keep national banks from being annihilated by the competition of state banks and trust companies having fiduciary powers.** This Court thus recognizes that state and national banks should function in the same competitive atmosphere.

So, likewise, in **American Bank v. Federal Reserve Bank**, 256 U. S. 350, 359, this Court held, in a suit brought in a state court and removed to a federal court, that a state bank could enjoin the Federal Reserve Bank from an unwarranted "warfare upon legitimate creations of the state," namely, state banks.

Not forgetting that the conduct of respondent complained of is nonbanking conduct, outside of any law, beyond all authority, and in defiance of law, and that Missouri in this matter is simply seeking to act in accord and not in conflict with the policy and the law and the authority of the United States, no authority has been adduced against the right of Missouri to act to suppress the usurpation.

Authorities, however, are available in favor of the right of the state to act.

In **First National Bank v. Commonwealth**, 143 Ky. 816, 34 L. R. A. (n. s.) 54, the question involved was whether land not used by a national bank for its national banking business could be escheated under the Kentucky law to the State of Kentucky. The national and state laws were in effect the same, that a national bank must confine its land holdings to land used for its bank building. The Court held that the land could be escheated to the state. Objection was made that the bank was an agency of the Federal Government; that Congress had provided a complete system of control and regulation and that the state had no authority to in any manner interfere with the affairs of national banks, and that state laws applicable to domestic and other corporations were wholly inoperative as to national banks, and that the state was without power to limit the quantity of real estate a national bank might own and hold. The following discussion of this question was had, and the Court states in conclusion (57 l. c.):

“In other words, our opinion is that, while the state cannot, by either Constitution or legislation, directly or indirectly, regulate or control the organization or conduct of national banks, so as to interfere with the legitimate business for which they were created, its laws applicable to banks and other corporations may be invoked against national banks when they attempt to

exercise rights or do things outside the scope of the business they were created to carry on, and that are not essential to their existence or efficiency. **We think that when a national bank exceeds the purpose of its creation and goes beyond the scope of its functions as a national banking institution, that the state may deal with such of its transactions as are in excess of the authority conferred by Congress and in violation of the laws of the state, as it would deal with the business or property of any other banking corporation.**

“This view finds support in the Davis case, *supra*, where the court said: ‘Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation.’ Also in *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461, 17 Sup. Ct. Rep. 85, where an insolvent debtor conveyed to a national bank real estate, thereby giving it a preference. The conveyance was assailed under the Massachusetts statute by other creditors as a preference. The bank resisted the right of the other creditors to question the conveyance, upon the ground that under the act of Congress national banks were entitled to take conveyances of real estate to secure pre-existing debts, and that the provisions of the Massachusetts statute were in conflict with the act of Congress. In the course of the opinion, holding that the state law was not in conflict

with the act of Congress, and that the other creditors had a right to share in the property conveyed to the bank, the court said:

“ ‘National banks are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.’ * * * Nor is there anything in the statutes of the State of Massachusetts here considered which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which, in case of insolvency, seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. **As well might it be contended that any contract**

made by a national bank within a state, in violation of the state laws on the subject of minority or coverture, was valid because state laws were in conflict with the act of Congress, or impaired the power of the bank to perform its functions.''

While sovereignties may not be sued, unauthorized acts of state or federal officials can nevertheless be restrained at the instance of mere individuals.

The following cases seem to make this proposition clear.

In *Osborn v. United States Bank*, 9 Wheat. 737, it was held that the bank, while it could not sue the State of Ohio because of the Eleventh Amendment to the Constitution of the United States, could sue Ohio's Auditor and require him to restore \$98,000 collected without authority, because the Ohio law he was acting under was unconstitutional.

In *Ex Parte Young*, 209 U. S. 123, a railroad filed suit to enjoin the Attorney-General of the state from enforcing the state law. In defense of the action it was pointed out that the Eleventh Amendment to the Federal Constitution provided that no suit could be brought against a state and that no suit on that account could be brought against the officers of the state acting under the authority of the state. In answer to this contention it was urged that the state law, the enforcement of which was sought to be en-

joined was, in fact, a nullity because violative of the Federal Constitution. This Court held that the Attorney-General of the state, notwithstanding the Eleventh Amendment to the Constitution prohibiting suits against the state and against officers of the state, could be enjoined from enforcing an unconstitutional and illegal state statute, and at **page 159** said:

“The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, **the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.**”

Missouri follows *Ex parte Young*.

In **Merchants Exchange of St. Louis v. Knott**, 212 Mo. 616, Judge Lamm, at **page 647**, **l. c.**, said:

“Finally, it is argued that defendants, as members and employees of the State Board of Railroad and Warehouse Commissioners, are in effect the State of Missouri; therefore, this suit, to all intents and purposes, is against the state, and as a sovereign state cannot be sued by its citizens, the plaintiffs must be cast. We shall

not enter upon the discussion of that theory. That the sovereign state may not be sued is a truism. It was the proud boast of Louis XIV that: 'I am the State.' But defendants are scarcely entitled to the protection of that imperial dogma in this case. They are mere plain ministerial officers, charged to be about to do irreparable injury to the business interests of their fellow-citizens by unlawful acts. As such ministerial officers, so charged, they are not beyond the strong arm of a court of equity.

"The highest court in the land has so lately held this matter in judgment and decided it against the contention of the learned Attorney-General (*Ex parte Young*, Petitioner, decided March 23rd, 1908, by the Supreme Court of the United States, and reported in 28 Sup. Ct. Rep. 441), that it would be supererogation to prolong this opinion otherwise than by announcing our conclusion that the point is ruled against defendants."

And in **Carson v. Sullivan**, 223 S. W. 571, the Supreme Court of Missouri, en banc, held:

"It is not to be understood from these cases that the state itself can be enjoined, but when its officers act in an unconstitutional or illegal manner, they are not to be regarded as acting for the state, and they may be enjoined. *Ex parte Young*, 209 U. S. 123; *Smith v. Ames*, 169 U. S. 466; 22 Cyc 881, paragraph b."

It therefore appears that, while a suit may not be brought (because of the Eleventh Amendment to the Constitution) against a state or officials of a state acting under and pursuant to legal authority, suit may be brought against state officials even by individuals to keep them from attempting to enforce unconstitutional or illegal enactments, for the reason that such enactments are without authority and, therefore, such officials cannot be acting as such in attempting to enforce them.

The same rule applies in restraining federal officials from enforcing federal unconstitutional enactments. Such officials in enforcing or attempting to enforce such enactments are not regarded as officials acting within the scope of their authority, or as officials at all, and so suits against them to restrain the enforcement of unauthorized acts are not regarded as suits against the United States.

It is settled beyond all question that federal officials and federal agencies, like state officials and state agencies, are not such officials or such agencies when they are about to enforce acts passed by Congress without constitutional authority or against constitutional prohibitions, because such acts, being unconstitutional and therefore unauthorized, officials are not acting as such when about to enforce them.

The following cases demonstrate this:

In **Wilson v. New**, 243 U. S. 332, the Receivers of a railroad enjoined the United States District Attorney for the Western District of Missouri from enforcing the Adamson Act, on the allegation that such act was without constitutional authority.

In **Hammer v. Dagenhart**, 247 U. S. 251, individuals enjoined the United States Attorney for the Western District of North Carolina from enforcing the National Child Labor Act, the allegation being that the Child Labor Act was unconstitutional and, therefore, a nullity.

In **Griesedieck Bros. Brewery Co. v. Moore, Internal Revenue Collector**, 262 Fed. 582, a brewery company enjoined the Collector of Revenue from enforcing or attempting to enforce the National Prohibition Act, approved October 28, 1919. The Court thus sums up the law on this proposition. We quote the Court opinion by Pollock, District Judge, in full:

“(1.2) Coming, now, first to a consideration of the separate motions of defendants filed against the complainants to dismiss the same for want of jurisdiction, it may be said:

“It is perfectly obvious this Court has jurisdiction to hear and determine the question raised as to the constitutional validity of the provisions of the act of Congress challenged, for such issue

is a judicial, and not a legislative, question; and on the decision of this one issue depend all others in this case; for, if the act in so far as challenged be within the constitutional power of the Congress to enact into law, the complainants, and all others, including the defendants, must obey and enforce its terms. **On the contrary, if the provisions of the act challenged by complainants are found and decreed as a matter of law to lie without and beyond the constitutional power of the Congress to enact into law, then the act is not a law. It has no office to perform, has no binding force or effect upon any citizen of the republic, and defendants, in enforcing it, or in attempting or threatening to enforce its provisions against complainants or their property and property rights, to their irreparable loss, injury and damage, are not officers of the law, acting within the scope of their lawful authority, but are, when so engaged, mere private individuals, volunteers and intermeddlers, whose injurious acts ought to and in justice should be restrained.** To such extent and end go all the authorities on the subject (*Osborn v. United States Bank*, 9 Wheat. 737, 6 L. Ed. 204; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; *Ex Parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. [n. s.] 932, 14 Ann. Cas. 764; *Wes. Un. Tel. Co. v. Andrews*, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; *Herndon v. Chi., Rock Island & Pac. Ry.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 Sup.

Ct. 340, 56 L. Ed. 570; *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. A. R. 1916D 545, Ann. Cas. 1917B 283; *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. A. R. 1917E 938, Ann. Cas. 1918A 1024; *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E 724; *Jacob Hoffman Brewing Co. v. McElligott*, 259 Fed. 525, ... C. C. A. ...; *Scatena et al. v. Caffey and Edwards* [Southern District of New York, August 20, 1919], 260 Fed. 756).

"The Court has jurisdiction to consider and determine the constitutional validity of the act in question. If valid the Court must so declare, and being valid, the law must be obeyed. If void for want of constitutional power, the courts to which that question is lawfully submitted must so declare; and if such result be decreed, neither the government, the defendants herein, nor any right-minded citizen will desire its enforcement, and the courts to which this question is lawfully submitted can neither decline nor escape decision of the question raised."

In *Kennington v. A. Mitchell Palmer, Attorney-General of the United States*, 255 U. S. 100, injunction jurisdiction against the Attorney-General of the United States was recognized to keep him from enforcing the provisions of the Lever Act of Congress on the ground that it was unconstitutional and, therefore, a nullity. To the same effect is *Tedrow*,

United States District Attorney, v. Lewis & Sons Dry Goods Co., 255 U. S. 98.

Finally is the case of the **State of Missouri v. Holland, United States Game Warden, 252 U. S. 416**, in which the right of Missouri was recognized to enjoin a United States game warden from enforcing the migratory bird law if such law be unconstitutional.

The foregoing suits challenged the legality or constitutionality of statutory enactments, asserting they were void and that the enforcement of them should therefore be restrained.

The instant case presents no challenge as to the legality or constitutionality of any act of Congress; it simply asserts the usurpation of a right or privilege which has never been established or recognized by Congress or by the State of Missouri. It has not even the color of an unconstitutional law to sustain it. **It is wholly without authority and is prohibited.**

How can it, therefore, be said that Missouri, with power to stay the hand of the officials of the federal government in the enforcement of direct legislation alleged to be without constitutional authority, is helpless to stay the aggressions and usurpations of a national banking organization doing business in Missouri when the act complained of is nothing more

than a usurpation of a right clearly withheld from and not granted to it by any law.

This bank, in engaging in branch banking, is not engaged as a national bank, but as one outside the law.

If federal officials and agencies are not above the restraining hand of the state to stop them from enforcing unauthorized legislative acts, it is clear the bank, though a national bank and as such, when acting within its authority, an agent of the government, is likewise not beyond the restraining hand of Missouri when it engages and is about to engage in acts it as a national bank has no authority to engage in, acts in addition prohibited by both nation and state. Such acts are not acts within the law. They are acts of outlawry against the nation and Missouri, which either the nation or Missouri may rightfully stop where, as here, Missouri acts in accord and not in conflict with the laws, aims and purposes of the nation. And in this connection it will be particularly noted that the usurpation complained of and sought to be suppressed is in violation of both the federal and state law.

We especially urge the consideration of the Court of the following three cases which consider legislative enactments of states that were in accord and

were not in conflict with federal enactments and on that account upheld the state legislative action:

Gilbert v. Minnesota, 254 U. S., 325-329-332;

Halter v. Nebraska, 205 U. S. 34;

Hale v. Henkle, 201 U. S. 43, 75.

It would appear that a sovereign state has the power to stop branch banking usurpation against federal and state law defiantly carried on within its borders.

Notwithstanding, the bank contended at the argument in the Missouri Supreme Court that it could do anything in the State of Missouri, no matter how wrong, without being subject to any restraint from the State of Missouri. If this position of respondent were true, it could tomorrow take possession of the office of the Treasurer of the State of Missouri, take charge of all the state's funds, and unless the Government of the United States would act Missouri would be powerless to remove the bank from the Treasurer's office, and from its control of the public funds; and if the United States never acted, what would become of the sovereign power of the state to protect itself? Would not Missouri thus be compelled to stand with uplifted hands, helpless under threats of an outlaw? We submit with all respect that such contention is absurd.

The contention made by the bank in this court now is not quite so farreaching. The bank contends that if Congress could have granted the bank the right to engage in branch banking that such ability to grant, so far as the state is concerned, is the same as though the bank had been by Congress granted such power. As the bank in its brief puts it, the bank's "grantable" powers can in no way be interfered with by the state (Brief, pp. 37, 49).

Equally untenable is this contention.

Congress in its wisdom grants a national bank certain powers. This means, according to the bank, that the bank can exercise all the powers Congress could constitutionally grant but did not grant, and this creature of Congress unless restrained by the Comptroller, could exercise the ungranted "grantable" powers in a state without let or hindrance from the state.

On page 49 of the brief of plaintiff in error it is said:

"As well may it be said that the state might complain, if the postmaster at St. Louis established a branch post office at a place where the State thought there should be none; or if the Collector of Internal Revenue for the district did likewise for the better accommodation of taxpayers."

The answer is plain. If the branch in such instances was authorized by the National Government the state could not and would not complain.

If it was not authorized it would probably not complain then even if the postmaster were using his own money to establish the branch, which probably would not occur. The state would not be particularly hurt by such a branch, but if anything, would probably be benefited.

In the case at bar, on the contrary, the establishment of branch banks works unquestioned injury against the state and its banking system besides being directly opposed to its policy and laws.

The bank, be it remembered, is not, in the case at bar, being interfered with in any of its legitimate operations. No burden is being cast on it. It is the one casting burdens. The proposition of the bank is, as we understand it, in brief, this: That a national bank, though without authority, though not granted any power to do the thing it is doing, may nevertheless do that thing if Congress could, though it did not, grant it the power to do that thing. In other words, this contention amounts to this, that under the dual plan of government under which we live Congress, by creating a creature with powers to do certain things, thereby gives that creature not only power to do the things it grants it the right to do, but

in addition grants it all the powers it had the power to grant such creature, and that such creature, in exercising such ungranted "grantable" powers, is free from interference by the state in which such ungranted powers are exercised, and may continue to exercise them and may be stopped only from exercising them at the instance of some official of the Government of the United States. The bank has cited no authorities for this theory, and we believe none can be furnished to support it. If this doctrine be true, a national bank may construct, operate and maintain an interstate railroad, because Congress has the power to grant it not only the authority to operate a national bank, but Congress could, in addition, grant it the further power of engaging in interstate transportation. Under this theory, then, the bank could construct, maintain and operate a railroad in a state and the state would be powerless to prevent the exercise of the "ungranted power" and all incidental powers thereto, and the only relief the state would have in such a contingency would be that some national government official would take action to restrain the bank from exercising the ungranted power of engaging in interstate transportation. If that is the law the state must shortly enter into a complete eclipse to be known no more by man. The "grantable" power theory is not tenable.

At page 50 of the brief for plaintiff in error this statement appears:

“Are there those who would contend that the general government might attempt to restrain within the supposed limits of the legislative grant corporations created by the state? And if not, what considerations make for the denial of the power in the one case which do not equally apply in the other?”

The answer is clear. If a state corporation acts in the national field, say, of interstate commerce, in violation of the Federal Anti-Trust Law, the state corporation becomes subject to two sovereignties, as Mr. Justice Brown, stating the opinion of the Court, said in the case of *Hale v. Henkel*, 201 U. S. 43, 75:

“It is true that the corporation in this case was chartered under the laws of New Jersey, and that it received its franchise from the legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have

with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations."

Thus it appears that though the National Government is not the creator of the state corporation it has, nevertheless, a right in the nature of a special visitatorial power, as was held in the Hale case, over state corporations to the extent they enter the federal interstate field and violate the laws thereof.

The converse of the situation existing in the Hale case exists in the case at bar.

In the case at bar, a bank is authorized to engage in national banking in the City of St. Louis, Missouri. As to all its authorized operations, the national government has unquestioned exclusive control, to the exclusion of any conflicting state action. The national bank, however, in the case at bar, is not engaged in operations within the bounds of its authority, but its operations are unauthorized activities outside the scope of its power and its authority. Such outside operations are not, of course, national bank operations at all. The nation, of course, has the right to suppress such outlaw operations.

Such outlaw operations in the case at bar happen to be operations that amount to an unwarranted warfare against the welfare of the state and its banking system, and so the state is also interested to protect itself and its banking system from this wrongful warfare.

Missouri in so acting is acting in the sphere of its sovereignty, of its police powers. To employ the reasoning of Mr. Justice Brown in the Hale case, a dual sovereignty exists when acts of a national bank that are non-national bank in character, and are wholly outside its authority, and are prohibited by both nation and state, are committed in a state and are acts that are highly injurious to the interests of the state.

To paraphrase Mr. Justice Brown with respect to such outlaw acts in the state, "the power of the state in this particular, in the vindication of its own laws, is the same as if the corporation had been created by an act of the state."

In *Guthrie v. Harkness*, 199 U. S. 148, 159, this Court held a stockholder by mandamus in a state court had a right to have an inspection of the national bank's books, notwithstanding the federal law providing that no such bank "shall be subject to any visitatorial powers other than such as are authorized under this title or are vested in the courts of

justice," and held if the statute were applicable the right to secure an inspection **vested in the courts of justice.**

And in *American Bank v. Federal Reserve Bank*, 256 U. S. 350, 359, this Court held the state bank could enjoin the Federal Reserve Bank, though an agency of the government, from unwarranted "warfare upon legitimate creations of the state," namely, state banks.

It appears the State of Missouri in the case at bar clearly had the right to maintain this proceeding against the outlaw operations of the bank.

The national bank as to such outlaw operations stands, and should stand, exactly in the same situation any foreign corporation stands in which commits in the domestic state acts that are wrongful and against the welfare of the state.

The brief, on page 50, proceeds:

"Under our form of government, it is fundamentally impossible that supreme sovereign power as to the same subject matter may rest both in the national government and that of the state."

Take prohibition, for example. The federal law forbids. The state law forbids. The state law, if it be in furtherance and not in conflict with the national law, is upheld, and both laws, of course, forbid the

same thing. While the national power over the subject is supreme, it is not exclusive. The state law is given recognition by the national government as a law in aid and in furtherance of national purposes. The same is true of the national flag case. The national law forbade certain uses of the flag. The state law, in furtherance and in aid of the national purpose, did much the same. Such state law was upheld. The same is true of the Espionage law, a law against speech that would injure the national military cause in the World War. A similar statute of the state in aid and in furtherance of national purposes, was upheld on this vital subject of national power, namely, the army in war. Evidently, therefore, there are fields where the state may act in accord with the nation, when the state acts in furtherance and not in conflict with the objects, aims and purposes of the nation, and that is the case here. The nation, by a policy from 1864 to date has by statutory provision, given no authority to a national bank, to establish branch banks anywhere, and in addition, by statute, forbids their establishment anywhere. The State of Missouri, for the very purpose of bringing its policy and its banking laws as applicable to its state banks, directly in line with the national banking policy, similarly by its law, prohibits branch banking. It is undoubtedly true that the nation could and, through its proper officers, should have acted in this case.

It is equally true, however, that such officers did not act and have not acted, though almost a year has elapsed, but from this it does not follow that the State of Missouri may not suppress, in the interest of the nation and in the interest of the state and the maintenance of its sovereignty, to accomplish the common purpose, this usurpation by this bank.

It appears the right and the duty are equally with the state to suppress the usurpation.

QUO WARRANTO.

Missouri Can Use the Writ of Quo Warranto to Stop Unauthorized and Illegal Operations of the First National Bank Within Its Territory to the Same Extent and Effect as It Can Use It to Stop the Unauthorized, Illegal Operations of Any Foreign Corporation, Especially When Such Operations Are Equally Acts in Defiance of National and State Authority.

When it is conceded that Missouri can stop the carrying on of an unlawful business, or a business not authorized by any law, Missouri can, with full propriety, constitutionally employ any lawful procedure which it may deem most appropriate and convenient to select, so long as it does not deprive the accused of its constitutional rights of due process of law. The decision of the State Supreme Court as to the

form of the remedy is adopted and given full faith by the Supreme Court of the United States on writs of error.

The bank is conducting the business of operating branch banks outside of the law, and by so doing is unlawfully, wrongfully and illegally usurping and exercising a privilege, and when such wrongs are committed by corporations, all must agree that procedure by quo warranto is unquestionably the proper remedy. This Court, in the case of **First National Bank v. Fellows ex rel. Union Trust Co.**, 244 U. S. 416, so regarded the matter.

If Missouri were undertaking to forfeit the charter of the bank, the authorities submitted by the bank might be in point, but Missouri is not undertaking to divest the First National Bank of any authority granted to it by law, and therefore is not interfering with its charter powers. This suit refers to matters entirely outside of and beyond the bounds of its charter powers.

State ex rel. v. Lincoln Trust Co., 144 Mo. 562;

State ex rel. Att.-Gen. v. Insurance Co., 152 Mo. 1;

State ex rel. Att.-Gen. v. Armour Packing Co., 173 Mo. 356;

State ex inf. v. Standard Oil Company, 218 Mo. 1;

Standard Oil Co. v. Missouri ex rel. Hadley, 224 U. S. 270.

In the case of *Standard Oil Company v. Missouri*, 224 U. S. 270, the Supreme Court of the United States held that the Supreme Court of Missouri, by virtue of its constitutional authority, had the right to entertain proceedings in quo warranto to oust foreign corporations from transacting business in the State of Missouri contrary to its laws. In speaking of the Supreme Court of Missouri, this Court held:

“Its decision and judgment necessarily imply that under that clause of the constitution it had jurisdiction of the subject matter and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That ruling is conclusive upon us, regardless of whether the judgment is civil or criminal, or both combined.”

In other words, the State of Missouri possesses the right to employ any remedy accessible to it and recognized by its courts as essentially proper to cure the evil complained of or to redress the wrong committed.

In the above case of *Standard Oil Co. v. Missouri ex rel.*, the Supreme Court of the United States also held that as to quo warranto proceedings of the character there involved, there was no denial of due process of law under the Fourteenth Amendment to the Constitution, and that:

“Due process requires that the court which assumes to determine the rights of the parties

shall have jurisdiction and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

The Bank Is Subject to Suit in the State Court.

The Attorney-General of Missouri, having, by virtue of his office, the right to institute this suit, has, as is clearly shown by the decision of the Supreme Court of the United States in the *Fellows* case (244 U. S. 416), not only relied upon his constitutional and common-law right to file the same in the Missouri Supreme Court, but has accepted the invitation of the Federal Government through the Acts of Congress bestowing upon state courts jurisdiction over suits against national banks. To hold that the Missouri Supreme Court was without jurisdiction in the case at bar would be in total disregard of the provisions of the federal statutes giving the Court jurisdiction. This is practically admitted by the bank (bank brief, pp. 52, 53).

Jurisdiction exists in the state court with the right of appeal to the Supreme Court of the United States.

All harsh and destructive conflicts regarding the rights of the respective states in the exercise of their sovereign power as against the authority of the United States delegated to its respective legislative and judicial departments by the Constitution of the United States are thus in all things successfully avoided and, too, in a most orderly way.

Independent of any statute of the United States conferring jurisdiction of state courts upon national banks, the Missouri Supreme Court, by virtue of its power representing the sovereign rights of the people of the State of Missouri, is clothed with ample jurisdiction to entertain any challenge made by the sovereignty of the state against any corporation, person or association seeking to transcend the law common to both the state and the United States.

The Currency Act of July 12, 1882, Chap. 290, Sec. 4, U. S. Compiled Statutes 1916, section 9668, provides:

“That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, **shall be the same as, and not other than,** the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking

association may be doing business when such suit may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

The sixteenth subdivision of **Section 24 of the Judicial Code** of the United States provides that while the District Court has original jurisdiction

"of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank, and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under its direction, as provided by said title";

it also provides that:

"All national banking associations established under the laws of the United States shall, for the purpose of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located."

U. S. R. S., Sec. 5136 (U. S. Comp. Stat. 1916, Sec. 9661) provides that national banks shall have power:

“Fourth. To sue and be sued, complain and defend, in any court of law and equity as fully as natural persons.”

From the foregoing it will be observed that state courts have general jurisdiction over national banks. From this we must necessarily conclude that this case was entertainable by the Missouri Supreme Court, regardless of the character of the question involved, so long as it does not fall within the special inhibition of being a suit between a national bank and the United States or between a national bank and officers and agents of the United States.

In the case of **Hermann v. Edwards**, 238 U. S. 107, the Supreme Court of the United States construed section 24, and particularly subdivision 16 thereof, as that statute now stands, by holding that state courts are possessed of full jurisdiction of all cases of whatsoever character against national banks, except those cases specifically exempted therefrom by said subdivision 16 of said section. Which exceptions are:

“First. All cases commenced by the United States or by the direction of any officers thereof against any national banking association;

“Second. Cases for winding up the affairs of any such bank;

“Third. For all suits brought by any banking association established in the district for which

the court is held to enjoin the Comptroller of the Currency or any receiver acting under his direction."

The instant case does not fall within any of the aforesaid exceptions and, therefore, it must be held that the Supreme Court of Missouri was within its proper jurisdictional grounds in entertaining this proceeding.

Mr. Chief Justice White's exposition of the relation between state and national judicial systems in enforcing federal rights may well be set forth here.

In *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 221, 223, a case in which a state court denied that federal rights could be required to be enforced in state courts against the will of the state, he said:

"Moreover, the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizens, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority,

state or nation, creating them. This principle was made the basis of the first federal judiciary act, and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legislative enactment, state or national. In fact, this theory and practice is but an expression of the principles underlying the Constitution and which cause the governments and courts of both the nation and the several states not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them. And it is a forgetfulness of this truth which doubtless led to the suggestion made in the argument that the ruling in *Second Employer's Liability cases* (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (n. s.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, had overthrown the ancient and settled landmarks and had caused state courts to become courts of the United States exercising a jurisdiction conferred by Congress, whenever the duty was cast upon them to enforce a federal right. It is true in the *Mondou* case it was held that where the general jurisdiction conferred by

the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States, because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that, for the purpose of enforcing the right, the state court was to be treated as a federal court, deriving its authority not from the state creating it, but from the United States. On the contrary, the principle upon which the Mondou case rested while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose."

The Supreme Court of Missouri had jurisdiction subject to the right of appeal to this court for ultimate decision.

Counsel for plaintiff in error, on page 83 of their brief, extend the challenge that no good reason has ever been suggested why any bank, state or national, should not have two or more offices or banking houses. We accept the challenge thus stated.

Among the many good reasons in opposition to the right of any bank in this country to have more than one office or place of business we submit the following:

(a) The original United States banks, the first from 1791 to 1811, and the second from 1816 to 1836, each had the right to establish branch banks under direct federal legislation with full regulatory powers in the hands of the government concerning the same. This branch banking system expired with the expiration of the charter of the last of said two banks in 1836, and since that time has never been generally recognized by the Congress.

(b) In 1864 the present banking system of the United States was established by Act of Congress, and branch banking privileges were deliberately omitted from the plan and never became a part thereof.

(c) To force a branch banking system upon a state which has adopted a system prohibiting branch banks will create an unwarranted warfare between the legitimate creations of the state and national

banks, and would in that respect be in derogation of the sovereignty of the state.

(d) The people of the United States, and the people of the State of Missouri since 1864, have been alike in their opposition to branch banks.

(e) At almost every session of Congress within the last thirty years bills have been proposed, at the instance of some monopolistically inclined national bank, authorizing the establishment of branch banks by national banking associations, and such measures have in every instance met with legislative defeat.

(f) From the foregoing it is apparent that the people, generally, and their representatives in their various legislative capacities are opposed to the branch banking system because of the ill effects that would be brought about if they were permitted. It is readily observable that these ill effects would be the stifling of competition, destruction of individual enterprise and initiative, subjection of commercial, industrial and general business interests to the dictates of centralized financial powers, rendering borrowing privileges difficult, and enable a few individuals to dominate the banking and business interests to the detriment of the general good. It would most assuredly have this effect in every city or business community wherein branch banks, offices or agencies or two or more offices of banking houses are permit-

ted to any one bank, whether that bank be of state or national authorization.

(g) National bankers and state bankers and trust companies all recognize the ill effects of branch banking, as shown by the resolution upon this subject adopted by the American Bankers Association at its forty-eighth convention, held in the City of New York October 2nd to 6th, 1922, which resolution as adopted is as follows:

“Resolved, by the American Bankers Association, that we view with alarm the establishment of branch banking in the United States and the attempt to permit and legalize branch banking; that we hereby express our disapproval of and opposition to branch banks in any form in our nation.

“Resolved, that we regard branch banking or the establishment of additional offices by banks as detrimental to the best interests of the people of the United States. Branch banking is contrary to public policy, violates the basic principles of our government, and concentrates the credit of the nation and the power of money in the hands of a few.”

Report of proceedings of forty-eighth annual convention of American Bankers Association, 1922.

The American Bankers Association is composed exclusively of officials of national and state banks

and trust companies. At its session above referred to and at the time designated in its program for the consideration of this identical question there were more than two thousand representative bankers present, coming from all parts of the nation. In fact, this was the largest meeting that organization ever held. May we ask, do counsel for plaintiff in error question the good faith and honest judgment of the members of this association, or assert that the resolution was adopted without good reason?

(h) In addition to the foregoing the bankers' associations of state after state have placed their respective organizations on record in a similar manner against branch banks. Banks and bankers of the country as a rule are against branch banking, as evidenced by their conduct in their respective conventions, and we deem it sufficient to say at this juncture that it will not be contended that these resolutions were adopted in their entirety and so unanimously and uniformly without having some good, substantial reason therefor, acquired through long years of experience in the business.

In conclusion, we submit that the First National Bank had no authority to and was prohibited from engaging in branch banking in St. Louis, Missouri, by the National Bank Act, and that its non-national-

bank act of nevertheless engaging in branch banking in St. Louis was violative of the Missouri law prohibiting branch banks, and that it was the right and duty of Missouri to suppress the usurpation.

The Supreme Court of Missouri having the right to enforce the public policy and statutes of that state, this court is not concerned with the manner in which it was done nor the conclusions arrived at by that court unless such action be in conflict with the national law or purposes as expressed by the government through its congressional action, and a dismissal of the writ of error would be a proper disposition of the case.

However, the Supreme Court of Missouri possessed the right to inquire into the conduct of the bank in that state because of the violation of a federal statute and because of the exercise of a right not granted by federal law, and the judgment of that court should be affirmed.

Because of a well-defined interest in the propositions presented in this case, the State of Missouri has filed no motion herein for a dismissal of the writ of error or pleas that would prevent an early consideration of the case, believing that the public welfare of the state and nation will be better served by going direct to the merits of the proposition involved, to

the end that there may be a final determination of
the matter at the earliest convenient time.

Respectfully submitted,

John N. Barnett
.....
Attorney-General of Missouri.

Merrill E. Otis
.....
Assistant Attorney-General of Missouri.
For Defendant in Error.
(Respondent in Certiorari.)

Sam B. Jeffries
.....

Wm T. Jones
.....

A. R. Sumner
.....

Merrill C. Earley
.....

Edw. W. Forristal
.....

Of Counsel.



APPENDIX A.

**Lowry National Bank of Atlanta, Ga.—Establishment
of Branch Office.**

29 Opinions of Attorneys-General (U. S.) 81.

A national bank, independently of Section 5190, Revised Statutes, is not, under its charter, authorized to establish a branch bank or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization.

Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

DEPARTMENT OF JUSTICE,
WASHINGTON,

May 11, 1911.

The Honorable,

The Secretary of the Treasury.

Sir:

I have the honor to acknowledge receipt of your communication of January 3, 1911, in which you say that the Lowry National Bank of Atlanta, Georgia, desires to establish another office or banking house in that city, and has requested the Comptroller of the Currency to state whether any objection will be made to such action, and you ask my opinion with reference to the right of a national bank to establish an additional or branch office or banking house in the place designated in its certificate of organization.

I have given the question consideration commensurate with its great importance and with the earnestness and ability with which it has been presented in briefs and arguments submitted on behalf of the bank, and will assign at some length the reasons for the conclusions which I have reached.

Whatever may be the English rule with reference to the power of the **stockholders** of a corporation to make a contract which will bind the corporation, when the power to make such contract is not prohibited, although not granted either expressly or by implication in its charter (**Riche v. The Ashbury Railway & Co.**, Law Rep. 9 Ex. Cas. 224, 227), the American rule defining the powers that may be exercised by a corporation is well settled, and was thus stated by the Supreme Court of the United States in **Green Bay & Minn. Railroad Co. v. Union Steamboat Co.**, 107 U. S. 98, 100:

"The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

The principle is also well stated in **People v. Pullman Palace Car Co.**, 175 Ill. 125, 136, as follows:

"The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers

thus conferred it may exercise other powers known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted—that is, to accomplish the purpose of its existence—and can in no case avail to enlarge the express powers and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary—that is, needful, suitable and proper to accomplish the object of the grant, and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation.”

Although it has been said, that

“ ‘A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same end (**Barry v. Merchants Exchange Co.**, 1 Sandf. Ch. [N. Y.] 280, 289)’ ”;

yet manifestly a corporation organized to engage in a certain business cannot do everything that can be done by a natural person engaged in a like business. The rights and powers of a natural person to enter into all kinds of contracts and to transact all character of business, are inherent; and any limitations upon that power must be found in some law restricting such rights; and hence, acts may be performed by

a natural person which only remotely or indirectly affect a business in which he is engaged, and are not necessary, needful or immediately appropriate to the transaction of the business, and which, if done by a corporation engaged in such business, would be ultra vires.

The fundamental principle here stated has been applied by some courts and textbook writers in connection with the establishment by banks of agencies for the transaction of a particular business, and also branches for the transaction of a general banking business; and it is well to review these authorities before applying the principle to national banks.

The leading case with reference to the power of a bank to transact a particular kind of business through an agency is **Bank of Augusta v. Earle**, 13 Pet. 519. The Bank of Augusta was incorporated by a special act of the Legislature of Georgia; and the corporation was given the general power to deal in bills of exchange. The principal office of the corporation was located in Augusta, Georgia, but an agency was maintained in Mobile, Alabama, for the purpose of trafficking in exchange. In the due course of business a bill of exchange drawn by a firm in Mobile on a firm in New York City in favor of the defendant Earle, accepted by the drawee and endorsed by the payee, was discounted by the Mobile agency with funds placed there for that purpose. The bill was protested for nonpayment and returned to the Bank of Augusta, whereupon suit was brought against Earle. The Circuit Court dismissed the suit upon the ground that the Bank of Augusta was without authority to make a contract in the State of Ala-

bama. On appeal this judgment was reversed by the Supreme Court, the main question there discussed and determined being whether a corporation had the power to make a contract outside of the state which had granted its charter. Upon this question the Court said:

“The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For, whenever it purchased a foreign bill and forwarded it to an agent to present for acceptance, if it was honored by the drawee the contract of acceptance was necessarily made in another state; and the general power to purchase bills, without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction” (pp. 587-588).

And, again:

“The corporation must, no doubt, show that the law of its creation gave it authority to make

such contracts through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted, by the laws of that place, to exercise there the powers with which it is endowed" (p. 589).

In **Tombigbee Railroad Co. v. Kneeland**, 4 How. 16, a Mississippi corporation vested with banking powers brought an action on a promissory note discounted at the branch office of plaintiff in Gainesville, Alabama. The act of the Legislature incorporating this company provided that it could establish branches when the directors deemed it expedient, at such places as might be designated by the Legislature. It does not appear, however, whether Gainesville had been designated as such place, but the case was made to turn entirely upon the authority of **Bank of Augusta v. Earle**, it being held that the transaction in question was authorized by the company's charter, and was valid, though the transaction was had in the State of Alabama.

City Bank of Columbus v. Beech, Fed. Case No. 2736, was an action brought to recover the amount of two bills of exchange discounted at an agency maintained in Cleveland, Ohio, by the City Bank of Columbus. The bank was incorporated under the laws of Ohio, and was vested with express power to buy, sell and discount bills of exchange, and it maintained the agency at Cleveland for the purpose of

dealing in bills of exchange. In passing upon the legality of such agency, Circuit Judge Nelson said:

“The acts under which the bank became a corporation conferred upon it the power to deal in exchange, without restriction, and hence the purchase of bills at the City of Cleveland, for the purpose of remitting the proceeds of paper belonging to the bank collected at that place, or even the dealing generally in exchange at that place by an agent, with the funds thus collected and remitted, was not in contravention of the charter of the bank, or of any law of the State of Ohio. I think this case falls within the principle of the case of *Bank of Augusta v. Earle*, 13 Pet. (38 U. S.) 519, and of *Tombigbee R. Co. v. Kneeland*, 4 How. (45 U. S.) 16, and that a new trial ought not to be granted.”

And District Judge Conkling thus stated the question presented:

“The question, then, is resolved into the simple inquiry whether a state bank, having power by its charter to deal in bills of exchange, without any express restriction as to place, can lawfully establish an agency for the purpose of buying and selling bills of exchange, in a part of the state other than that of its location”;

and the question was answered by the learned Judge in the affirmative.

Many cases might also be cited wherein it has been held that banking corporations have the power to establish clearing house agencies.

These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or

possibly to some other particular class of business incident to the banking business. But, are they authority for the proposition that a bank may establish a branch for the transaction of a general banking business?

In none of the cases cited has it been suggested that the principle declared can be extended to include such a power. On the other hand, the case of **People v. Oakland County Bank**, 1 Douglas 282, 288, decided by the Supreme Court of Michigan, is clearly to the contrary. The Oakland County Bank was organized under a special act of the Legislature, and the only reference therein to its place of business was, that the parties mentioned might receive subscriptions to the capital stock of a bank to be located at such place **in the County of Oakland** as the majority of the stockholders might direct; and, again, upon the paying in of twenty thousand dollars of the capital stock of the bank, the commissioners or directors should procure a convenient place **in said County of Oakland** and commence operations. There was no **prohibition** in the act against the bank doing business anywhere in the state, or against its establishing a branch. However, the bank did establish a branch in Detroit, in which was carried on a regular banking business, and the action was brought to revoke the charter of the bank because of the maintenance of this branch. The Court held that the corporation was wholly without authority to establish the branch, saying:

“By the act of incorporation, the stockholders were authorized to locate the bank in the County of Oakland. It follows, therefore, that if the corporation has undertaken to exercise any of its

franchises without that county, it has usurped an authority in violation of law and must suffer the penalty which that law inflicts.”

In **Bank of Augusta v. Earle** it was held that, though the Legislature of the State of Georgia did not undertake to authorize the corporation to do a banking business outside of that state, yet the bank could transact a **particular business** in the State of Alabama through an agency; while in the **Oakland County Bank** case it was held that under a like limitation in its charter powers the establishment of a branch wherein a general banking business was carried on was unauthorized and unlawful.

If, in the former case, a branch bank had been established in Mobile for the purpose of conducting a general banking business instead of a mere agency for the purchase of bills of exchange there is nothing in the opinion of the Supreme Court to indicate that, in a direct attack upon such institution, it would have been held as authorized by the bank's charter; while, in the latter case, if a mere agency for the purchase of bills of exchange had been established in Detroit the Supreme Court of Michigan would, in all probability, have sustained the validity of its transactions.

These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.

That such a distinction does exist, in fact, is obvious.

An agency requires no division of the capital stock, and the details of the business are few and are easily

supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution.

That the authorities sustaining the validity of transactions by an agency do not apply to the establishment of a branch bank is further shown by the following authorities, wherein it is expressly declared that a bank cannot establish a branch unless the power to do so is granted by its charter, or the general laws relating to the subject, in express language or by necessary implication.

In *Morse on Banks and Banking*, section 46, it is said:

“Agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange, may be established in other places. In these cases it is for the convenience of the public that such should be the case. But there is no case which holds that an agency for the exercise of the more important and valuable functions, such as issuing circulating paper or discounting notes, or an agency designed to carry on the general business of banking, would be regarded as legal. For such nominal establishment of agencies might easily result in the practical establishment of a network of branch banks throughout the home state or in other states.”

In *1 Morawetz on Corporations*, sec. 387, it is said:

“Banking corporations have implied authority to create agencies for special purposes, such as

the redemption and purchase of bills of exchange and other securities, wherever this may be advantageous in carrying on their business, but they have no right to establish branch banks in the absence of express authority conferred by charter. When a banking corporation is created to do business at some particular place, it is implied that its banking house shall be established at that place only, and that its affairs shall be managed by a single set of officers, in the usual manner."

Magee on Banks and Banking, sec. 30, says:

"The question of privilege in the establishment of a branch bank seems to be settled that a national bank has no right to establish branch banks without special legislative authority. The ruling is upon the principle, no doubt, that the bank must have a location or place where all its business is to be transacted, and branches, especially if established outside of the city or town and at a place other than the location of the mother bank, would lead to conflict as to where notes should be protested and payments to be made."

In Zane on Banks and Banking, sec. 24, it is said:

"If private banking is permitted, there is no reason, in the absence of legal prohibition, why a private bank should not have branches, but a corporation has only the powers granted it, and it cannot establish branches unless the power to do so is granted to it."

In **Morehead Banking Co. v. Tate**, 122 N. Car. 313, 316, the charter of the bank provided that "its princi-

pal place of business shall be at Durham, North Carolina," but did not, in express terms, permit the establishment of branch banks. However, the bank established a branch at Burlington, North Carolina, and the cashier at this branch executed a bond for the faithful performance of his duties, and the action was brought to recover for a breach of the bond. The Court held that the defendant was not in a position to question the right of the bank to locate a branch at Burlington; but, in response to the contention that the expression in the charter that the "**principal** place of business shall be at Durham" by implication authorized the establishment of a branch bank or agency at another point, the Court said:

"This court would not be willing to sanction this practice of establishing branch banks or agencies to do a banking business unless they are **expressly** (bold-face type the court's) authorized by legislative authority contained in the charter. And any bank without having this express grant undertaking to establish such branch establishments will lay itself liable to have its charter vacated."

In **Bruner v. Citizens Bank of Shelbyville**, 134 Ky. 283, 298, the power of a bank to establish a branch, when not expressly authorized to do so by its charter, was very fully and ably considered; and, after enumerating many reasons why such authority should not be implied, unless such implication necessarily arose from the language used, the Court concluded its opinion as follows:

"Other reasons might be advanced against granting the powers contended for, but we con-

sider these sufficient to support the conclusion we have reached that, in the absence of express legislative authority, the power to establish branch banks does not follow by implication as a reasonable or necessary incident to the right to do a banking business. This construction does not mean that banks may not have agents. There is a wide difference between the appointment of agents to receive and collect money and forward it to the bank or to transact other business necessary or incidental to banking and the right to establish branch banks at which a general banking business is carried on. A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it. We believe that safe and conservative banking methods, the protection of the public, the security of depositors, and the interests of the stockholders all demand that banks shall have only one place at which to 'carry on the business of banking and discounting and negotiating notes, drafts, bills of exchange and other evidences of debt, and purchasing bonds, receiving deposits and allowing interest thereon, buying and selling exchange coin and bullion and lending money on personal or real security.' And that to legalize by judicial construction a departure from this course would soon result in failure that would do infinite harm to the banking interests of the state and bring disaster to numbers of innocent people."

My attention has been called to no case or text-book wherein the principle has been stated with approval that a bank has the power to establish a branch for the carrying on of a general banking business, un-

less such power is granted either in its charter or by general statute in express language or by necessary implication; and, in view of the authorities above cited, it should be considered as settled that no such power otherwise exists.

With this principle in mind, let us examine the laws pertaining to the establishment and control of national banks and determine whether any such power is therein granted, either expressly or by implication.

The general powers granted to national banks are contained in Section 5136, Revised Statutes, paragraphs 6 and 7. In paragraph 6 the association is given power to prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business shall be conducted and the privileges granted to it by law exercised and enjoyed; and by paragraph 7 it is empowered

“to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, **by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes, according to the provisions of this title.**” •

Clearly, neither of these provisions contain an express or **necessarily** implied power to establish a branch bank. The former relates to the adoption of by-laws by the board of directors prescribing the manner of conducting the business of the institution;

while the latter confers the power to carry on the business of banking by the exercise of the particular powers enumerated therein. While these powers are designated as incidental, yet undoubtedly all powers are also granted which are reasonably necessary for the exercise of each and every one of these enumerated powers.

As said in **First National Bank v. National Exchange Bank**, 92 U. S. 122, 127, in referring to Section 5136, Revised Statutes:

“Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently.”

Yet, the power to establish a branch bank is certainly in no respect essential to the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidences of debt, or of exercising either or any of the incidental powers named in the statute, or of any power which is incident to the carrying on of a general banking business.

The only clauses which relate to the place where a bank may transact business are, first, in Section 5134, Revised Statutes, where it is provided that the certificate of organization shall specify:

Second. “The **place** where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular **county or city, town or village.**”

And, second, Section 5190, Revised Statutes, which provides that:

“The usual business of each national banking association shall be transacted at **an** office or banking house, located in the place specified in its organization certificate.”

The first of these provisions does not expressly prohibit the carrying on of a general banking business outside of the place designated in the certificate; yet it is agreed that the clear implication therein is that the power of the bank to carry on such a business cannot be exercised elsewhere than in such place; and there is certainly no implication or intimation in this clause that the association may establish an unlimited number of banks or branches within the designated place.

The arguments presented on behalf of the bank have been directed mainly to section 5190; but it has not been even suggested that there is anything in the language of this section which of itself can possibly be construed as an implication that a national bank has the power to establish a branch bank. The sole contention is that this section does not **expressly prohibit** the establishment of a branch.

It may be admitted that there is reasonable ground for this contention and that if there were any provision elsewhere in the national banking laws which clearly implied that such authority existed, by a subtle process of reasoning this section could be construed to be consistent therewith. But, in the absence of such language elsewhere in the act, and in view of the general principle that banks cannot es-

tablish branches unless the power to do so is granted, it appears to me that the natural meaning of this section is that the general banking business of a national bank must be conducted in **one** office or banking house, within the place designated in its organization certificate.

But little light is thrown upon the meaning of this section by the decisions of the courts. In **Merchants Bank v. State Bank**, 10 Wall. 604, 650, it was insisted that the certification of checks by a cashier at another place than his banking house was, under this section, void; but the Court held to the contrary, saying:

“It is objected that the checks were not certified by the cashier at his banking house. The provisions of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection.”

This decision is but in line with **Bank of Augusta v. Earle** and other cases in which it was held that a bank may transact a particular class of business outside its banking house.

In **Armstrong v. Second National Bank of Springfield**, 38 Fed. 883, 886, one question was whether or not a national bank could enter into a general ar-

rangement with a bank at another point to cash its checks, and Judge Sage, upon this point, said:

“If, now, we turn to Section 5190 of the United States Revised Statutes, we find it enacted that ‘the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.’ Under this section it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at **ITS office** or banking house.”

There is some doubt whether this holding of the learned Judge is in accord with the cases above cited which uphold the power of a bank to maintain an agency.

In neither of these cases was the bearing of this section upon the power to establish branch banks before the Court or given any consideration. Hence, so far as the courts are concerned, the precise meaning of this section is an open one; but I think the construction above given the most natural and reasonable.

Section 5138, Revised Statutes, also has an important bearing upon this question. There it is provided that the minimum capital stock of a bank in a place containing from three to six thousand inhabitants shall be not less than \$50,000; in a place from six to fifty thousand inhabitants, not less than \$100,000, and in all larger places the capital shall be not less than \$200,000.

In a branch bank bills of exchange are negotiated and discounted; moneys received for deposit; ex-

change, coin and bullion are bought and sold; money is loaned, and every kind of banking business that is authorized is there transacted, unless it be the issuing and circulating of bank notes. In proportion to the amount of business transacted, the same capital is required to run the branch bank as to operate the parent bank. In the City of Atlanta no national bank can be organized for a less capital than \$200,000, and if a national bank in that city, having a capital stock of \$200,000, should establish a branch bank therein, the practical result would be that two banks would be in operation on a capital upon which only one bank is authorized to do business in that city, and each additional branch would, of course, constitute a further division of the capital, in violation of the spirit of this section of the statutes.

Furthermore, I have carefully examined the national banking laws, and I fail to find any provision which empowers the Comptroller to restrain or to regulate in any manner the conduct of a national bank with reference to the establishment and maintenance of branch banks. He is authorized and directed to approve of the name assumed by the association (Sec. 5134, Rev. Stats., par. 1); when notified that 50 per cent of the capital stock has been paid in, and the laws have otherwise been complied with, he is required to examine into the condition of the association, the name and place of residence of its directors, the amount of capital stock of which each is the owner in good faith, and whether such association has complied with all the provisions of the act, and shall cause a proper statement to be attested by oath of a majority of its directors and the pres-

ident and cashier; and, if, after such examination, it appears that the association is lawfully entitled to commence the business of banking, it is his duty to issue a proper certificate to that effect (Secs. 5168 and 5169, Rev. Stats.); he is required to approve the increase of capital stock (Act of May 1, 1886, Sec. 1; Sec. 5142, Rev. Stats.); and also the decrease of the capital stock (Sec. 5143, Rev. Stats.); he can, at his discretion, extend the corporate existence of the association (Act of July 12, 1882, Sec. 9; 22 Stat. 162); he must approve reserve agents of the association (Secs. 5192 and 5195, Rev. Stats.); he is required to give notice to an association that is short in reserve funds (Sec. 5192, Rev. Stats.); he must approve the change of name and location of a bank (Act of May 1, 1886, Sec. 2; 24 Stat. 18), and shall also approve of the conversion of state banks into national banks (Sec. 5154, Rev. Stats.); but there is no provision directing or authorizing him to exercise any power whatever with reference to the location of a branch bank, or the terms and conditions upon which such a branch may be established and maintained.

Can it be supposed that if Congress intended to authorize the establishment of branches by national banks, no restraint whatever would have been thrown around the exercise of such power, and that the Comptroller, who in all other respects is given such ample power of control over the existence and conduct of banks, would not have been vested with some power or control over the location of such branches, and the manner in which the same should be established and conducted?

If, under the laws as they now exist, a national bank has the power to establish a branch, the exercise of that power is entirely within the discretion of the board of directors of the association, and it may be exercised without any restraint whatever; and the Lowry National Bank can establish, not only one branch in the City of Atlanta, but any number of branches, without consultation with the Comptroller with reference thereto. Such an unrestrained power, it appears to me, would be fraught with the most serious danger, and would result in an inflation of banking business upon insufficient capital, and in an inadequate means of supervision and control over a bank's business by the chief officials in authority, which, in all probability, would bring disaster to the welfare and reputation of the national banking system.

It is quite probable that some national banks, under peculiar circumstances, should be permitted to establish branches, but this should not be done except under the supervision and direction of the Comptroller, who should possess the authority to make careful investigation of all the conditions, and exercise his judgment as to whether the establishment of such branch should be permitted, and to prescribe proper regulations by which it should be conducted.

It is needless to say that such a power can be granted only by Congress, and cannot be vested in the Comptroller by a mere construction of the statute, when the statute contains no clause which will warrant such a construction.

Finally, the construction heretofore placed upon the banking laws, both by Congress and your de-

partment, has been uniformly in accordance with the view that a national bank has not the power to establish a branch bank.

By Section 7 of the Act of March 3, 1865, ch. 78 (13 Stat. 484; Sec. 5155, Revised Statutes), it is provided that:

“It shall be lawful for any bank or banking association organized under state laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of circulation redeemable at the mother bank and each branch to be regulated by the amount of capital assigned to and used by each.”

If the power existed for national banks to have branches, there was no necessity for this express provision allowing state banks, when converted, to retain their branches; and, moreover, the limitation of this power to such banks as had their capital assigned to the mother and branch banks in definite proportions clearly shows that it was not supposed that such a power was possessed by banks in general.

By Act of May 12, 1892 (27 Stat. 33), any national bank in Chicago designated by the World's Columbian Exposition was, upon approval by the Comptroller, authorized to conduct a banking office upon the exposition grounds, the time within which such branch might be operated being restricted to two years; and a similar act was passed March 3, 1901

(31 Stat. 1444) with reference to the establishment by the banks of St. Louis of branches on the grounds of the Louisiana Purchase Exposition.

Of course, the interpretation of statutes is a judicial function, and the courts may disregard the meaning ascribed to an act in subsequent legislation. But, the construction of an act by Congress, especially by the Congress which enacted it, is always given much consideration, the general rule being thus stated in **United States v. Freeman**, 3 How. 556, 565:

“If it can be gathered from a subsequent statute, in *pari materia*, what meaning the legislature attached to words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.”

The officers of your department who have administered the banking laws have also given a like construction to this section. I have been unable to find any expression made by them with reference to this feature of the banking laws, previous to August 10, 1889. On that date Solicitor Hepburn held, in an opinion rendered at the request of the Comptroller, that under Section 5190, Revised Statutes, a banking association had to transact its usual business in **one** office or banking house. That this construction has been uniformly followed and concurred in is shown by the “Instructions and Suggestions of the Comptroller of the Currency Relating to the Organization, etc., of National Banks,” issued in 1909, wherein it is said:

“The word ‘place’ and ‘at an office or banking house’ (as used in section 5190) have always

been construed by the Comptroller to mean the **legal domicile** of the corporation, of which it can have but one" (p. 40).

And, again:

"While the National Bank Act does not, in express terms, prohibit the establishment and maintenance of branch banks or agencies by associations or primary organization, the implication to that effect is clear, and the courts have held that what is implied is as effective as that which is expressed" (p. 42).

On November 15, 1910, this question was submitted to the present solicitor of your department, who, after mature and careful consideration, concurred in the opinion of Solicitor Hepburn.

With this uniform construction of this statute by your department for more than twenty years, and the unmistakable inference that the Congress which passed the act entertained the same view as to its meaning, I would hesitate to express a contrary opinion, if, as an original proposition, I believed the act capable of being so construed, even though the contrary construction were the more reasonable.

However, upon the various considerations above stated, it is my opinion that:

First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization, and,

Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

Respectfully,

J. A. Fowler,
Assistant to the Attorney-General.

Approved:

Geo. W. Wickersham,
Attorney-General.

Acknowledged by Mac Veigh, June 2, 1911.

APPENDIX B.

**Instructions
of the
Comptroller of the Currency
Relative to the
Organization and Powers of National Banks.
1920.**

Page 110.
Chapter 9.
Branch Banks.

112. Domestic Branch Banks.

The only provision in the National Bank Act relating to branch banks is found in Section 5155, United States Revised Statutes, and reads as follows:

“It shall be lawful for any bank or banking association, organized under state laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws and to retain and keep in operation its branches, or such one or more of them as it may elect to retain * * *.”

The granting of this special privilege to converting state banks and the absence of any similar provision in the law with respect to domestic branches of national banks of primary organization have always been construed by the Comptroller to imply that banks of the latter class were not permitted to have domestic branches. The section cited absolutely

restricts branch banks of converted associations to such as have a definite proportion of the capital of the parent bank assigned to them, and it is not to be assumed that the law contemplated that associations of primary organization should be permitted to assign any portion of their capital to and operate domestic branches.

This fact is further to be inferred from Section 5138, United States Revised Statutes, which prohibits the formation of associations with less capital than \$200,000 in cities of population exceeding 50,000, and with less than a specified capital in places with population less than 50,000.

To permit the establishment of domestic branch banks would not only render possible an evasion of the provisions of section 5138, but tend to discourage the organization of banking associations which, in the absence of such branches, might be formed.

Section 5134 provides in part that the organization certificate of a national bank shall show "the place where its operations of discount and deposit are to be carried on," and section 5190 that "the usual business of each national banking association shall be transacted at an office or banking house (not offices or banking houses) located in the place (not places) specified in its organization certificate."

The words "place" and "at an office or banking house" have always been construed by the Comptroller to mean the legal domicile of the corporation, and this construction is sustained by the solicitor of the Treasury in an opinion rendered August 10, 1899, on the question of the right of a national bank to establish and maintain an auxiliary cash room at

some point distant from its banking house for the purpose of receiving deposits and paying checks. The solicitor says:

“This section (5190, U. S. Rev. Stat.) contemplates that the usual business of a national banking association shall be transacted at one office or banking house, and as receiving deposits and paying checks belong to the ‘usual business’ of a bank, I am of the opinion that the statute does not authorize the establishment of an auxiliary cash room in a different part of the city for the purpose proposed. Besides, it may be observed that if a national banking association can lawfully establish and maintain a separate office for receiving deposits and paying checks, it could as well establish as many such auxiliary cash rooms in the city of its corporate residence as its business might require; and, indeed, the entire business of the bank might be parceled out and conducted in the same way all over the city.”

The District Court of the United States, in the case of *Armstrong v. Second National Bank of Springfield* (38 Fed. Rep. 883), involving among other things the question of the right of a national bank to cash a check elsewhere than at its banking house, held that:

“Under this section (5190) it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at its office or banking house.”

If, therefore, it is unlawful for a national bank to cash a check elsewhere than at its banking house, it is likewise unlawful for it to discount notes or to re-

ceive deposits elsewhere, for one is as much a part of the "usual business" of a bank as the other. As it is obviously impossible for a bank to transact its entire business within the four walls of any single building, it is not held that the law contemplates that the "entire business" as distinguished from its "usual business" shall be transacted in its banking house.

In the case of *The Merchants National Bank of Boston v. The State National Bank* (10 Wall. 604) it was held in this connection that:

"The provision requiring the 'usual business' of the association to be transacted 'at an office or banking house specified in its organization certificate' must be construed reasonably, and a part of the legitimate business of the association which cannot be transacted at the banking house may be done elsewhere."

The question involved in this case was the right of the bank's officers to purchase gold elsewhere than at its banking house, and the Court held that:

"The gold must necessarily have been bought, if at all, at the buying or selling bank or at some third locality. The power to pay was vital to the power to buy, and inseparable from it."

The "legitimate business" of a bank, therefore, which a reasonable construction of the law would permit to be done elsewhere than at its banking house would seem to be restricted to transactions similar in character to that involved in the decision quoted and not the ordinary and usual business of receiving deposits and cashing checks.

While the National Bank Act does not expressly prohibit the establishment and maintenance of domestic branch banks or agencies by associations of primary organization, the implication to that effect is clear, and the Attorney-General of the United States, in an opinion rendered on May 11, 1911 (before the passage of the Federal Reserve Act, authorizing the establishment of branches in foreign countries, dependencies or insular possessions of the United States), in the case of the Lowry National Bank of Atlanta, Ga., which desired to establish branch banks within the limits of that city, held that:

“First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and

Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.”

That the act does not contemplate the operation of domestic branch banks by national banks of primary organization is evidenced by the fact that in 1892 a special act was approved authorizing the operation of a branch by a Chicago national bank on the World's Fair grounds. In 1901 similar legislation was enacted by Congress in connection with the Louisiana Purchase Exposition held in 1904.

APPENDIX C.

Opinion of the Supreme Court of Missouri in State ex rel. v. First National Bank in St. Louis, Delivered March 3, 1923.

This is an original proceeding in quo warranto to determine the authority of a national bank engaged in business in the City of St. Louis to establish and conduct a branch bank at another than its regular place of business in said city.

I. A national bank is an artificial legal entity, created to facilitate the transaction of fiscal affairs under the authority of the laws of the United States. Like other corporations, it possesses such powers as are granted to it by the act of its creation, or, more comprehensively stated, which have been or may be conferred upon it by Congress within the limitations of the Federal Constitution. This reference as to the origin of its powers does not, as we shall subsequently show, prevent state legislation in regard thereto. Existing, as it necessarily does, by law, it possesses only such powers as are expressly granted or which may necessarily be implied for the effective discharge of its corporate functions. As to powers expressly granted, no difficulty need be encountered in defining their limitations. As to those incidental, it must appear, to authorize their exercise, that they are clearly within the scope and purview of the purpose for which the corporation was created. This rule is especially applicable when it is sought to invoke what are termed the powers of a corporation incident to it at common law; such ap-

plication being authorized only when it is apparent that the power invoked is a necessary incident to the proper exercise of the corporation's existence or functions (*Kerens v. Trust Co.*, 283 Mo., l. c. 621; *State ex inf. Missouri Ath. and St. L. Clubs*, 261 Mo., l. c. 599; *Millinery Co. v. Trust Co.*, 251 Mo., l. c. 575).

These rules are elementary in character to the extent that they may be termed hornbook law on this subject. They have been stated to emphasize their general application to all classes of corporations in the absence of statutes to the contrary.

While we have contented ourselves with the citation of cases in this behalf determined within our own jurisdiction, they assert a general doctrine which does not contravene the rulings of any Court, state or national, when rightly considered. To illustrate: In *Bullard v. Bank*, 18 Wall, l. c. 593, it was held that "the extent of the powers of national banking associations is to be measured by the act of Congress under which such associations are organized."

In *Logan etc. Bank v. Townsend*, 139 U. S., l. c. 73, it was announced with equal emphasis that "it is undoubtedly true, as contended by the defendant, that the National Bank Act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

To a like effect are the following cases: *Bowen v. Needles Nat. Bk.*, 94 Fed. 925; *Commercial Nat. Bk. v. Pirel*, 82 Fed. 799, 49 U. S. App. 596; *Hanover*

Nat. Bk. v. Burlingame Nat. Bk., 109 Fed. 421, 48 C. C. A. 482; Hyde v. Equit. Life Assur. Soc., 116 N. Y. Sup. 219; Ocmulgee Riv. Lum. Co. v. Ocmulgee Val. Ry. Co., 251 Fed. 161; State v. Am. Sugar Ref. Co., 138 La. 1005; Somerville Water Co. v. Somerville, 78 N. J. Eq. 199; Knapp v. Sup. Commandery, 121 Tenn. 212.

Guided by these rules, a reference to and a review of the laws creating national banks and defining their powers is of first consideration.

Persons desiring to form a national bank are required, among other things, under the Act of Congress of June 3, 1864, to file with the Comptroller of the Currency a statement of the place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village (Subdiv. 2, Sec. 5134, p. 3455, 3 Comp. Stat. U. S.)

A subsequent section of the same act provides that the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate (Sec. 5190, p. 3486, 3 Comp. Stat. U. S.)

No express power to establish a branch bank appears in either of these statutes. Section 5134, in requiring the certificate of organization to designate the county, city or town in which the bank is to be located, is intended for the information of the Comptroller in enabling him to intelligently determine whether the authority sought to be exercised should be granted. While the Banking Act is silent on the subject, a construction of same is not unreasonable which clothes the Comptroller with at least such dis-

cretion in the premises as will enable him to act intelligently or with a proper regard for the demands of business in approving or rejecting the articles of organization. Hence, a general designation of the proposed business location as provided in said section is all that is necessary.

The purpose of section 5190 is not for the information of the Comptroller, it being a matter with which he has no concern when he has granted the articles as to where the place of the business shall be located within the county, city or town. This is a matter to be determined by the board of directors in establishing the business. To render their act specific it must be confined to the terms of the statute, viz., to "an office or banking house within the county, city or town" named in the articles. This location having been established, it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words "an office or banking house" cease to be specific, and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. Such a construction finds no resting place in reason. If followed it would, instead of centralizing and rendering more stable the powers of a bank, enable it, by multiplying its places of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. Such an effect was certainly never contemplated by the Banking Act.

II. We are more concerned, however, with an interpretation of the language of subdivision 7 of sec-

tion 5136, granting incidental powers, whether literally or liberally construed, than with the probable effect of its operation under the construction sought to be given to it by the respondent. If, as we have stated, the terms of section 5190 be unmistakable in limiting the location of the place of business, such location, so long as maintained, will, under the **terms of the** statute, exclude by implication the establishment of **a branch bank**, the business of which is to be conducted under the authority of the original articles of organization. However, it is contended that the power to establish branches is authorized under section 5136. The language of subdivision 7 of that section provides, among other things, that the board of directors of a bank may, subject to law, exercise all such incidental powers as shall be necessary to carry on the banking business. Several preliminary assumptions are necessary before substantial color can be given to this contention. First, section 5190 must be so construed as to authorize the transaction of a bank's business at offices or banking houses instead of at "an office or banking house"; second, the establishment of a branch bank must be held to be the exercise of an incidental power; third, such power, when exercised, must be within the law, and, fourth, it must be necessary to the transaction of the banking business.

The first assumption we have discussed with the result that the unmistakable character of the words employed and the purpose to be accomplished did not, in our opinion, authorize such an interpretation of the section as to enable its terms to be read in the plural as well as the singular number. The sec-

and involves the question as to the meaning of incidental powers. The statute (subdivision 7, section 5136) employs the word "incidental," rather than the word "implied," in designating the power other than that expressly conferred on the board of directors. An incidental power, as we said in *State ex inf. Harvey v. Missouri Ath. & St. L. Clubs* (261 Mo., l. c. 599), is one directly and immediately appropriate to the execution of the powers expressly granted and exists only to enable the corporation to carry out the purpose of its creation (citing cases).

An implied power is one that may be inferred from that granted or, as the Supreme Court of Massachusetts has said (*Grant v. Marshall*, 138 Mass. 228), it is a grant or reservation by implication of law. In *State ex inf. Harvey* (supra), we defined an implied power more elaborately as one "possessed by a corporation not indispensably necessary to carry into effect others expressly granted and comprises all that is appropriate, convenient and suitable for that purpose, including as an incidental right a reasonable choice as to means to be employed in putting into practical effect a power of this character." Without chopping logic or refining distinctions as to these adjectival words, it will suffice to say that in statutes and judicial opinions they are frequently interchangeably used (3 *Thomp. Corp.* [2nd ed.], sec. 2105). This need not concern us, however, in the determination of respondent's contention, as the statute uses the word "incidental," and to this we will give attention.

What, therefore, are the powers of a national bank "directly or immediately appropriate to the execution

of the specific powers granted?" The provisions of subdivision 7, following the phrase conferring incidental powers upon the board of directors, furnish examples from which, by analogy, the scope of this character of powers may be determined. They include the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidences of debt; the receiving of deposits; the buying and selling of exchange, coin and bullion; the loaning of money on personal security, and the obtaining, issuing and circulating of notes. While these powers are distinct and neither is a limitation upon either of the others, they cannot be otherwise held than as directly and immediately appropriate to the transaction of the banking business. Although they may not be such incidental powers as are given generally to all banking institutions, they are incidental to banks created under the National Bank Act (*Seligman v. Charlottesville Nat. Bk.*, 3 Hughes 647, 21 Fed. Cas. No. 12642). While a national bank may lawfully do many things in securing and collecting its loans in the enforcement of its rights and the conservation of property previously acquired, the exercise of such powers is incidental in being necessary for the purpose of carrying into effect the powers expressly granted (*Morris v. Springfield Third Nat. Bk.*, 142 Fed. 25, 73 C. C. A. 211; *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402). The cases cited are illustrative of the limitations upon the latitude given national banks, not in the character of acts they may primarily engage in as a business, but in the management and protection of property and property rights acquired in the usual banking transactions, including such minor incidental powers in addition as may be adapted to the ends in view.

In addition to those cited the trend of the cases defining the incidental powers of national banks is in harmony with the foregoing conclusion.

The apparent purpose for the establishment of branch banks is to multiply the places of business of the principal bank and thereby increase the volume of same. As a manifestation of commercial progress, the effort may well be commended. That phase of the matter, however, is not under consideration. It is a question of power and not progress that demands solution. Certainly it is in no sense essential to the exercise of any of the powers granted nor is it a necessary incident to the carrying on of the banking business within the meaning of the statute.

The third limitation necessary to be observed before an incidental power can be invoked by a national bank, is that it must be "within the law." The law referred to is the National Bank Act to which banks organized thereunder owe their existence and within the scope and purview of which they must exercise their functions. The sections of the act reviewed lend no countenance to the contention that the establishment of branch banks is within the scope and purview of these sections and hence not within the law.

The fourth and last limitation upon the exercise of incidental power by a board of directors required by subdivision 7 is that such power shall be necessary "to carry on the business of banking." In a review of the other conditions necessary to the exercise of power referred to, we have held that the carrying on of the banking business did not require the establishment of branch banks and hence that it was not within the terms of the statute.

III. An unambiguous statute, such as the National Bank Act, does not require the adventitious aid of subsequent kindred legislation to determine its meaning. Despite this fact where, as here, there is a general grant of power, however clear that grant may be, the enactment of subsequent legislation containing a specific kindred grant of power will afford at least persuasive support to the conclusion that the latter was not included within the former or the original grant. Such is the effect of the Act of Congress of March 3, 1865, now Sec. 5155, 3 U. S. Comp. Stats., p. 3467. This act provides that any bank or banking institution organized under a state law and having branches may, in conformity with existing law, become a national bank and retain its branches. In the passage of this act it is evident that the legislative construction of the original is that it did not authorize the establishment of branch banks. Otherwise the subsequent section 5155 would not have been enacted. A recognition of the limitations of the National Bank Act is evident from the fact that the right of a national bank to have branches as provided in said section is limited to states the banking laws of which authorize the establishment of branches.

The establishment by special acts of Congress of a branch bank at Chicago during the Columbian Exposition and at St. Louis during the Louisiana Purchase Exposition affords further evidence of legislative construction of the National Bank Act, which excludes from its incidental powers the right to establish branch banks.

In addition, it is a well-established rule of construction that a long-continued interpretation of a

statute by public officers charged with its execution, while not controlling upon the courts, is entitled to special consideration (*McAllister v. Cupples Station*, 283 Mo. 115; *State ex rel. Chick v. Davis*, 273 Mo. 660; *State ex rel. Kin. Tel. Co. v. Roach*, 269 Mo. 437; *Ewing v. Vernon Co.*, 216 Mo., 1. c. 689).

Apropos of the foregoing, it is shown that the attorneys general of the United States have uniformly construed the National Bank Act as not authorizing the establishment of branch banks.

IV. Enough has been said to demonstrate the fact that neither by express terms nor reasonable implication can it be held that national banks are authorized to establish branches in states which have not granted that authority to banking corporations doing business therein. This being true, it remains to be determined whether the processes of the state can be invoked to prevent the exercise of power by a national bank shown to be ultra vires under the law of its creation. That national banks are corporate entities which owe their existence to federal law alone and as such are subject to the paramount authority of the United States, there can be no question. Equally as well established is the fact that a state cannot through its legislative department define the duties of national banks or control their affairs whenever such attempted exercise of authority expressly conflicts with the law of the United States (*Davis v. Elmire Savings Bk.*, 161 U. S. 275; *McClellan v. Shipman*, 164 U. S. 356).

The information filed herein by the Attorney-General does not involve the commission of an act in conflict with the laws of the United States, nor does

it tend to impair the efficiency of any agency of the National Government. It cannot, therefore, be said to be in conflict with the rule above announced and hence does not violate it.

This conclusion finds ample support in a review of the National Bank Act alone; but if further reasons therefor are deemed necessary they may be found in an illuminating discussion by the Supreme Court of Kentucky (*First Nat. Bk. v. Comm.*, 143 Ky. 816, 34 L. R. A. [n. s.] 54) defining the limits that may be placed upon the federal control of national banks, or conversely the extent to which the state may exercise control over them. The state court ruled in the affirmative on this question. The objection was made that the bank was an agency of the Federal Government for which Congress had provided a complete system of control and regulation, and that the state could not in any manner interfere with its affairs, and that state laws applicable to banks incorporated within the state were inoperative as to national banks. The Court held, in effect, that while a state cannot either by its constitution or legislation directly or indirectly regulate or control the organization or conduct of a national bank so as to interfere with the business for which it was created, the laws of the state applicable to banks and other corporations organized therein may be invoked against a national bank when it attempts to exercise rights or do things outside the scope of the business it was created to conduct and which is not essential to its existence or efficiency; that when a national bank exceeds the purpose of its creation and goes beyond the scope of its functions the state may deal with such of its

transactions as are in excess of the authority conferred upon it by Congress and in violation of the laws of the state in the same manner as it would deal with the business or property of any other banking corporation.

The rule as thus announced is supported by the holding of the United States Supreme Court in the Davis case, *supra*, in which, after declaring the paramount authority of the federal law over national banks, it was said, that "Nothing in this opinion is intended to deny the operation of general and un-discriminating state laws on the control of national banks so long as such laws do not conflict with the letter or the objects and purposes of Congressional legislation."

A further ruling to like effect by the United States Supreme Court is found in the McClellan case, *supra*. In that case an insolvent debtor conveyed real estate to a national bank, thereby giving it a preference. This act was assailed by the other creditors as in violation of a state statute. The bank resisted the right of the creditors as thus asserted, upon the ground that national banks, under the federal laws, were authorized to take deeds to real estate to secure pre-existing debts, and that the Massachusetts statute was in conflict with the act of Congress, and, hence, inoperative. The Supreme Court held that the state law was not in conflict with the act of Congress, and that the other creditors had a right to share in the property conveyed to the bank. The exhaustive manner in which the question was considered is shown in the following excerpt from the opinion:

"National banks are subject to the laws of the state and are governed in their daily course of

business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' * * * Nor is there anything in the statutes of the State of Massachusetts here considered which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which, in case of insolvency, seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank within a state, in violation of the state laws on the subject of minority or coverture, was valid because state laws were in conflict with the act of Congress, or impaired the power of the bank to perform its functions."

V. In this state the banking business can be conducted only by a corporation. Thus organized, the extent of its powers must, as we have said, be deter-

mined by the statute of its creation. The State Banking Act gives express recognition to this rule in providing that banks, whether incorporated under federal or state law, can transact only such business as is permitted by the law of the United States or of the state (Sec. 11684, R. S. 1919). Branch banks not having been permitted by the state law, either by express terms or necessary implication, the well-recognized canon of construction will authorize the exclusion of this power from those granted. Reliance upon this rule is, however, unnecessary in the presence of a subsequent section (Sec. 11737, R. S. 1919), in which it is provided "that no bank shall maintain in this state a branch bank or receive deposits or pay checks except its own banking house." The attempt, therefore, of the respondent to establish a branch bank is not only an act in excess of its corporate powers but in violation of an express statute.

The writ of quo warranto invoked by the relator is a recognized right and an appropriate remedy under the circumstances (*State ex inf. Attorney-General v. Standard Oil Co.*, 218 Mo. 1). Upon an appeal to the Supreme Court of the United States in the *Standard Oil* case that Court held (224 U. S. 270) that the proceeding by quo warranto which had been instituted in the State Supreme Court in that case by the Attorney-General was authorized. Discussing the powers of the Missouri Supreme Court in the premises it was held that "its decision and judgment necessarily imply that under that clause of the Constitution it had jurisdiction of the subject matter and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That ruling is con-

clusive upon us, regardless of whether the judgment is civil or criminal, or both combined."

VI. The right of the Attorney-General to institute this action having been established, the question arises, although it does not seem to be seriously contested, as to the tribunal in which it should be brought.

The 16th subdivision of section 24 of the National Judicial Code provides, among other things, that the United States District Courts have original jurisdiction "of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located."

The United States statutes further provide that national banks shall have power "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons" (U. S. R. S., Sec. 5136; U. S. Comp. Stats. 1916, Sec. 9661).

Under Section 5198 (3 Comp. Stat., p. 3493, 6 Fed. Stat. Ann., p. 928), prescribing where suits may be brought against national banks, it is provided "that

suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

Under the proviso of an act of Congress approved July 12, 1882 (U. S. Comp. Stat. 1916, Sec. 9668), it is further provided "that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suit may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

From the foregoing, it will be seen that, as this case does not fall within the inhibitions of the federal statutes quoted, jurisdiction of same may be entertained by this Court.

In *Hermann v. Edwards* (238 U. S. 137), the United States Supreme Court construed subdivision 16 of Sec. 24 of the National Code and held, as it must have held within the unmistakable meaning of said subdivision, that state courts were clothed with jurisdiction to hear and determine all cases against national banks except those exempted under said sub-

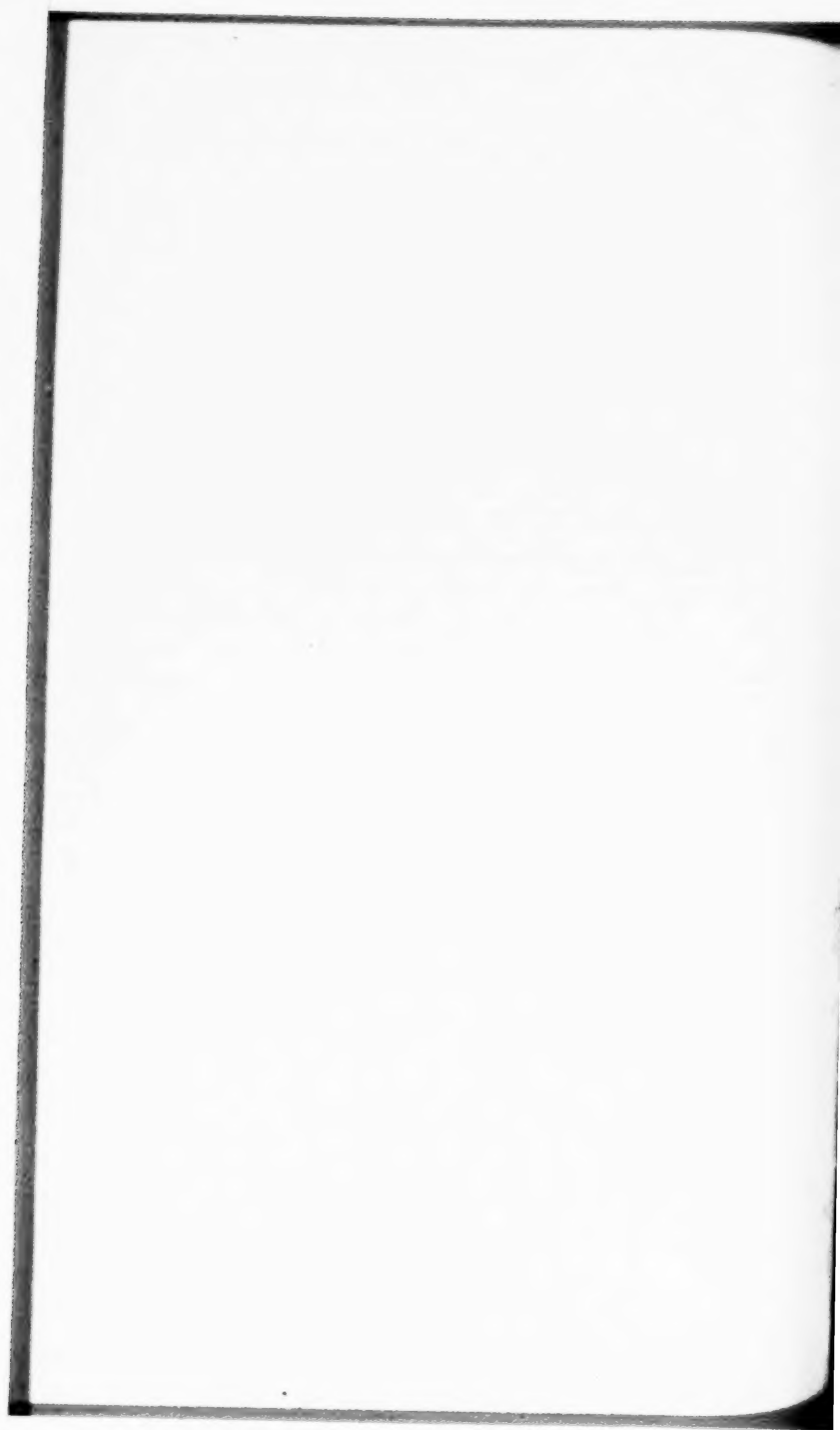
division. The case at bar does not fall within those exemptions.

This is not a proceeding to deprive the respondent of any right or limit the exercise of any power conferred upon it by the laws of the United States, but to prevent it from committing an act in violation, under the established rules of construction, of the laws of its creation and expressly contravening a state statute.

The character of a judgment in quo warranto cases is largely within the discretion of the Court and foreign corporations may, under numerous precedents, be prohibited by a general ouster from committing particular illegal acts (*State ex inf. Attorney-General v. Standard Oil Co.*, 218 Mo. 1; *State ex inf. Attorney-General v. Standard Oil Co.*, 194 Mo., 1. c. 149; *State ex inf. Attorney-General v. Armour Packing Co.*, 173 Mo., 1. c. 366; *State ex inf. Attorney-General v. Firemen's F. F. Ins. Co.*, 152 Mo. 1; *State ex inf. Attorney-General v. Arkansas Lumber Co.*, 190 S. W. [Mo.] 894).

In view of all of the foregoing, judgment of ouster as prayed in the pleadings is hereby ordered. All concur except Ragland, J., not sitting.

R. F. Walker, J.



NOV 8 1923

WM. F. STANS

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in Error,

vs.

STATE OF MISSOURI at the Informa-
tion of JESSE W. BARRETT,
Attorney-General,
Defendant in Error.

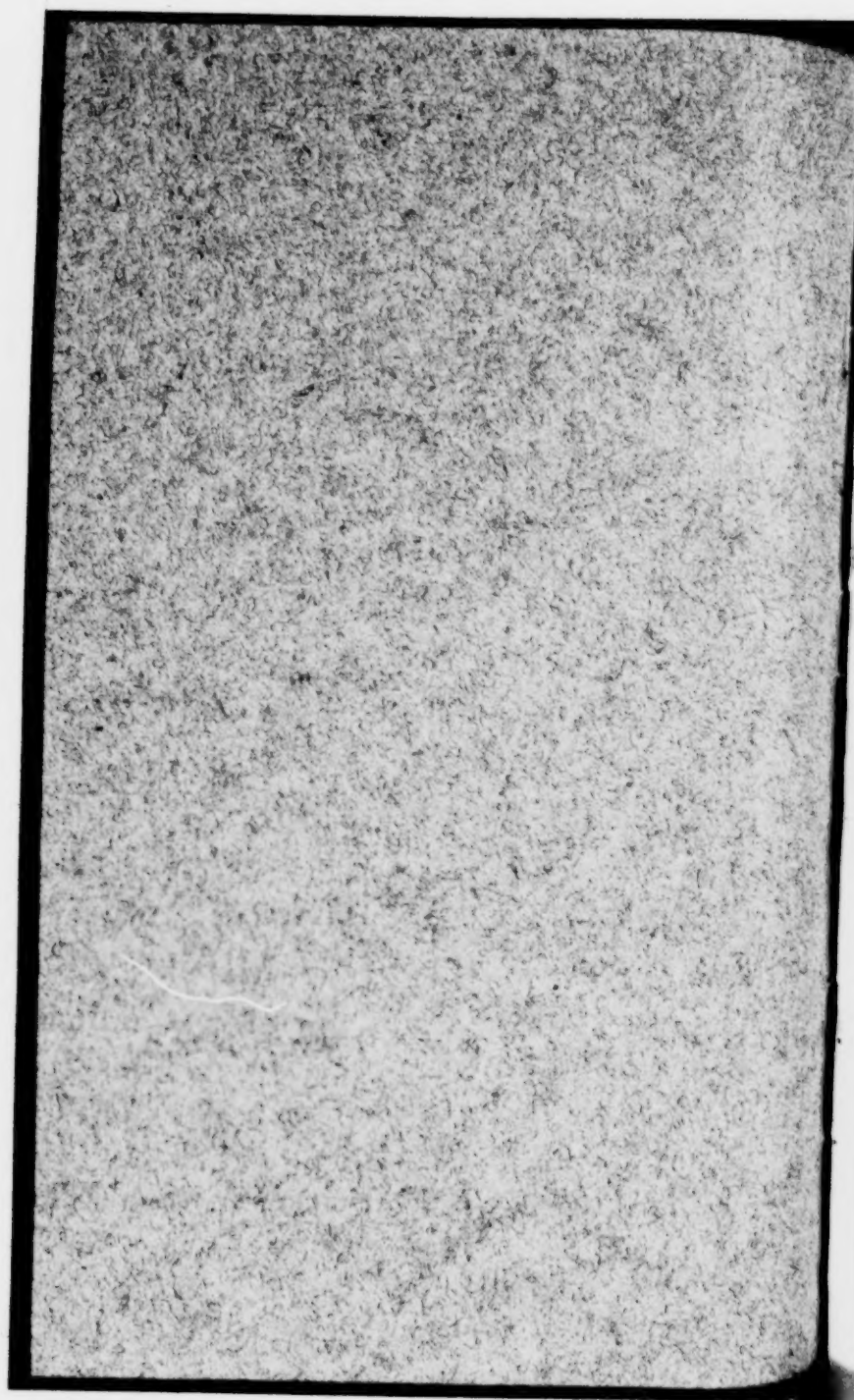
No. 252.

In Error to the Supreme Court of Missouri.

**BRIEF FOR DEFENDANT IN ERROR ON
REARGUMENT OF CASE.**

JESSE W. BARRETT,
Attorney-General of Missouri.

✓ ROBERT C. MORRIS,
✓ FREDERICK W. LENNANN,
✓ HAROLD R. SMALL,
✓ MERTON E. LEWIS,
✓ SAM B. JEFFRIES,
✓ WILLIAM T. JONES,
✓ MARION C. EARLY,
Of Counsel.



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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS,

Plaintiff in Error,

vs.

STATE OF MISSOURI at the Informa-
tion of JESSE W. BARRETT,
Attorney-General,

Defendant in Error.

No. 252.

In Error to the Supreme Court of Missouri.

**BRIEF FOR DEFENDANT IN ERROR ON
REARGUMENT OF CASE.**

This case was argued and submitted on May 7th, 1923, of the October, 1922, Term of this Court, following which the Court, on May 21st, 1923, made this order:

“It is ordered that this case be restored to the docket for reargument at the next term, on the issue whether the State had authority to institute and maintain a proceeding to question compliance by a national bank with its charter.”

The Court, on October 22nd, 1923, entered the following orders:

“On consideration of the motion of the United States for leave to file a brief herein as *amicus curiae*, and to participate in the oral argument of this cause, it is now here ordered by this Court that the said motion be, and the same is, hereby granted.

“On consideration of the motion of the plaintiff in error for modification of order, and to extend the scope of the reargument in this cause, it is now here ordered by this Court that the said motion be, and the same is, hereby granted; and that any further briefs on behalf of the plaintiff in error or of the United States shall be filed on or before November 1st, and briefs in reply thereto shall be filed on or before November 9th, next.”

Our answer to the question propounded by the Court on May 21st, 1923, will cover the entire case.

THE ISSUE.

Has a State authority to institute and maintain a proceeding to question compliance by a national bank with its charter?

THE BANK'S ANSWER TO THE QUESTION.

The answer of the bank, it appears, is in effect that a national bank can in a state transgress the laws and authority of the Nation and the State to any extent it chooses, and that the State is powerless to question or stop such conduct. The Nation alone, the bank contends, can stop the transgression. And if the Nation does not stop it, the bank, without interference from the State, may continue its transgression of national and state laws.

THE STATE'S ANSWER TO THE QUESTION.

1. If the establishment and operation of branch banks by a national bank in a state is in excess of any authority from any source and if such unauthorized excesses contravene state law and policy and amount to a war of destruction upon the law-abiding banks of the state, the State (until the Nation draws the bank back in bounds) can at least question and stop such defiance of state law and order.

The Nation, of course, can also question and stop such conduct. The State has no authority to cut down any of the bank's authorized activities.

2. But if, on the contrary, the act of the national bank in the state is only an act in excess of, and thus only against, national authority, and is not in addi-

tion an act in contravention of local or state law, the State has no authority and claims no authority to question or stop such conduct. The Nation alone has such authority.

Thus the State of New York has no authority to question or stop the branch banking of national banks in New York City where state banks operate branches, if such conduct, though unauthorized by the Nation, does not transgress the policy or laws of the State of New York.

THE STATE'S PROPOSITION.

Branch banking by a national bank in Missouri as conduct in excess of any authority from the Nation, as conduct in contravention of Missouri law, and as conduct which amounts to unwarranted warfare upon competing Missouri state banks, is conduct either the Nation or Missouri has authority to question and stop.

The information filed by the State shows that the plaintiff in error is a national bank with an established banking house at Broadway and Locust streets in the City of St. Louis, Missouri; that it has established and is operating another, a branch bank, at another location in the city and intends to and will establish and operate other branch banks there unless prohibited; that it is not authorized to do this and is prohibited from so doing by the National Bank

Act, and that the establishment and operation of such branch banks is also opposed to the public law and policy of the State of Missouri and is to the great detriment of its banking interests and to its industrial and general business activities and welfare. The Supreme Court of Missouri was asked to end such conduct in the state.

The question is whether the State has authority to act.

There is no good reason why a national bank should be permitted, by the State, to exercise in the state powers which the national bank does not possess. No good reason is perceived why a State should not stop the unlawful operations in the state of a national bank when such operations are in excess of any authority, just as it may stop the unauthorized unlawful operations in the state of any other corporation. Especially is this true when the unauthorized operations of the national bank in the state are not only in contravention of state law but also amount as here to an effort to destroy the state banks.

The Court will understand that the purpose of the information filed in this case and the effect of the judgment of the Supreme Court of Missouri is not to deprive the bank of any right granted to it by the laws of the United States, nor to affect any of its legitimate operations in Missouri, nor is the information or judgment of the State Supreme Court in any

sense against the life of the bank nor any of its legitimate activities anywhere.

The information charges the bank with setting up and operating a branch bank, and with threatening to open and operate many more branches without warrant and regardless of the law. What the bank threatens to do amounts to a corporate usurpation and an illegal invasion of the rights of the State and of the Nation. Any such attempt, it would seem, may properly be restrained by the State.

If the State, in charging that the bank is without authority, has misunderstood or misconstrued the law; if national authority to establish branch banks does exist; if the federal statutes really do authorize branch banks—then the case of the State falls, and the State can have no relief.

But, if the bank has no authority from the Nation to engage in branch banking in Missouri, it cannot engage in branch banking by relying merely upon an unfounded claim of authority.

An unfounded claim of authority is not the equivalent of authority.

Counsel, however, apparently lose sight of this obvious fact that authority is one thing, while an unfounded claim of authority is an entirely different thing. The effect of authority is, of course, entirely different from the effect of an unfounded claim of authority.

The bank has no authority to engage in branch banking, but, because it claims such authority, it insists that the State must suffer from the bank's transgression without any relief, unless and until the Nation recognizes the plight of the State and stops the transgression of the bank. Unless and until the Nation acts, the unlawful excesses of the bank continue without any right in the State to end them.

In the case now under consideration the plaintiff in error is operating its bank at Broadway and Locust street in St. Louis, and is actually authorized to engage in the business of banking at that place. In contravention of Missouri law, and without authority from any source, but claiming authority from the Nation, the bank has opened and is operating another, a second, bank at 818 Olive street, in St. Louis, Missouri, and proposes opening and operating many other banks, branches or offices in St. Louis. It now contends that the State cannot prevent it from continuing to operate this other bank nor from establishing and operating any of the proposed additional banks, contending that the State has not the power to question or stop these excesses of national authority that are in addition in contravention of Missouri law—excesses that mean the destruction of all law-abiding banks in St. Louis.

As acts of agents of the State (**Osborn v. Bank**, 9 Wheat. 737, **Ex Parte Young**, 209 U. S. 123), and

as acts of agents of the Nation (**Wilson v. New**, 243 U. S. 332) can be questioned and stopped on the ground of lack of authority, it follows that the acts of a national bank as a national agency can likewise be questioned and stopped by the Nation if such acts are without authority. If, besides being acts in excess of any authority from the Nation, such conduct is violative of the law of the State in which committed and is injurious to the welfare of the State, such conduct can by the State be questioned and stopped as conduct in derogation of its sovereignty.

In short, the mere unfounded claim of a national bank that it has national authority to commit the act in the state is no shield for its misconduct as against the Nation nor as against the State.

It would appear that, the policy of the Nation and the State being the same, namely, against branch banking, the State in the situation here presented has the right and is in duty bound to take action to stop the lawless conduct, at least until the Nation acts. **United States v. Lanza**, 1922-1923 U. S. Sup. Ct. Adv. Ops., p. 169, the prohibition case; **Gilbert v. Minnesota**, 254 U. S. 325, the espionage law case; **Halter v. Nebraska**, 205 U. S. 34, the national flag case, and many other cases of this court recognize that the same act may be an offense against both sovereignties and that each may take action to question and stop such act.

It is inconceivable that a national agency, a national bank, can commit an act in one of the indestructible States of the indestructible Union in defiance of all law, and ruin competing state banks operating legitimately. If it can, and the State is helpless to stop such conduct, the State is quite the contrary of being indestructible. It is as of wax, and may itself be destroyed at any time by the exercise of ungranted powers at the instance of a national bank. *Texas v. White*, 7 Wall. 225, recognizes a State as on firmer footing.

In this republic, we believe, there yet remains a dual system of government—national and state; that each within its own domain is supreme, and that one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other (**Re Huff**, 197 U. S. 488).

It would seem from this general survey of the question that the State must, as a matter of self-preservation, necessarily have the right to question and stop an unlawful act in the state that is an act in excess of any authority under either sovereignty and against the welfare of the State until such time at least as the Nation acts to stop the national bank's usurpation.

We shall now proceed to consider in detail the elements of the State's proposition, taking up in order

the act of branch banking, first, as an act in excess of national authority; second, as an act in contravention of state law and policy; third, as an act amounting to unlawful warfare upon and destruction of Missouri state banks, and then, the conclusion that the State has authority to act.

I.

BRANCH BANKING BY A NATIONAL BANK IN A STATE IS CONDUCT IN EXCESS OF ANY AUTHORITY FROM THE NATION.

Under the National Bank Act a national bank can lawfully exercise only powers expressly granted and those necessarily incidental (*Logan County Bank v. Townsend*, 139 U. S. 67).

It is not claimed that there is statutory authority for branch banking.

The only contention made is that there exists in plaintiff in error an incidental power which confers upon plaintiff in error the right which it has asserted, to establish and maintain branch banks. Is such power of necessary implication?

Such power should not be implied, because the policy of branch banking contained in the first United States Bank Act, 1791-1811, and also contained in the second United States Bank Act, 1816-1836, was entirely discarded by the third or present National Bank Act, which went into effect in 1863-1864.

Centralization was the keynote of the first and second United States Bank Acts. Decentralization was the characteristic of the third or present National Bank Act.

The great argument in favor of the passage of the present act was that it would not in any measure tend to concentration of banking power.

Such was the spirit in which the National Bank Act was framed.

On March 3, 1865, there was enacted what is now known as U. S. R. S., Sec. 5155, Act March 3, 1865, c. 78, Sec. 7, 13 Stat. 484. The reason for the enactment is found in the Congressional Globe covering the second session of the Thirty-eighth Congress, 1864-1865, page 1125, at which page it appears that the bill was offered and was passed to a second reading. On March 3, 1865, pages 1281, 1282, of the above publication, it appears that Senator Van Winkle of West Virginia, the sponsor for the bill, gave the reason for this section by stating that there existed in his state, the Northwestern Bank at Wheeling, West Virginia, and that it had been by law required under the state law of West Virginia to establish a branch at Parkersburg, West Virginia, with a capital of \$100,000; that this branch was established about 1845 and had continued in existence since; that the purpose of the bill was to permit that bank, required as

stated, to have such a branch, to come into the federal system and become a national bank.

On March 3, 1865, after this statement by Senator Van Winkle, the present section 5155, U. S. R. S. was enacted. It provides:

“It shall be lawful for any bank or banking association organized under state laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each.”

It will be noted in passing that this section, while it authorizes the conversion of a state bank with branches into a national bank with branches, does not authorize such bank when so converted to thereafter acquire or establish additional branches.

(Section 5155, United States Revised Statutes, as amended in 1913 by Section 8 of the Federal Reserve Act, limits this conversion right by providing that a state bank cannot be converted into a national bank if such conversion shall be in contravention of state law —1923 Instructions of Comptroller, p. 21.)

The next action taken by Congress with reference to branch banks was on May 12, 1892, when special authorization was given by law for the establishment and operation of a branch bank by a national bank in Jackson Park, Chicago, during the Chicago Exposition.

Next, similar special authority was, on March 3, 1901, given by Congress for a branch bank in Forest Park, St. Louis, Missouri, for the Louisiana Purchase Exposition.

Next, Congress, by Section 25 of the Federal Reserve Act of 1913, as amended by the acts of September 7, 1916, and September 17, 1919, gave the power to National Banks to have foreign branch banks. (See Comptroller's Instructions 1923, at page 115; Treasury Department Document No. 2920.)

Under this authorization for a foreign branch bank it is to be noted that by Section 25 of the Federal Reserve Act a national bank to operate a foreign branch bank:

- (1) Must have a capital and surplus of \$1,000,000.00 or over;
- (2) Must apply for a permit and secure the approval of the Federal Reserve Board for the proposed foreign branch bank;
- (3) Must operate the foreign branch bank on "such conditions and under such regulations as may be prescribed by the Federal Reserve Board";

(4) Must furnish information of the condition of the foreign branch on demand and "the Federal Reserve Board may order special examinations of said branches";

(5) Must have the accounts of each foreign branch bank conducted independent of the accounts of every other foreign branch bank and of its home office.

Foreign branch banks are, by law of Congress, authorized under these safeguards only. In view of the character of this legislation, and in view of the fact that there is no similar legislative authorization for domestic branch banks in the states, can it be questioned that congressional construction is that a national bank has no authority to engage in branch banking in any state?

Branch banking, if engaged in by a national bank in a state, is done without any of the safeguards thrown by law around foreign branch banking.

It may now be well to consider what the departmental construction has been and is.

In the 1923 Instructions of the Comptroller of the Treasury, Treasury Document No. 2920, at page 115, under the heading "Branch Banks," is found the Comptroller's printed construction, as follows:

“Chapter X.

Branch Banks.

124. Domestic branch banks.

“The only provision in the National Bank Act relating to branch banks is found in Section 5155, United States Revised Statutes, and reads as follows:

“‘It shall be lawful for any bank or banking association, organized under state laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws and to retain and keep in operation its branches, or such one or more of them as it may elect to retain. * * *

“The granting of this special privilege to converting State Banks and the absence of any similar provision in the law with respect to domestic branches of National Banks of primary organization have always been construed by the Comptroller to imply that banks of the latter class were not permitted to have domestic branches. The section cited absolutely restricts branch banks of converted associations to such as have a definite proportion of the capital of the parent bank assigned to them, and it is not to be assumed that the law contemplated that associations of primary organization should be permitted to assign

any portion of their capital to and operate domestic branches.

“In a number of cases a State Bank having branches is converted into a National Bank under the provisions of this section, retaining its branches, and the National Bank has later been consolidated with another National Bank under the Act of November 7, 1918, the consolidated bank being permitted under law to retain and operate the branches.”

The foregoing is the short form of statement adopted in 1923 in place of the much fuller form used by the Comptroller in 1905 instructions and all subsequent instructions up to 1923.

The 1920 instructions in effect in 1922, when plaintiff in error began its branch banking, are set forth in full in an appendix to our prior brief (pp. 126-130).

On May 11, 1911, Attorney-General Wickersham furnished the Secretary of the Treasury with an elaborate opinion reviewing the law and the departmental construction, and came to this conclusion (29 U. S. Atty. Gen., 81, 97):

“With this uniform construction of this statute by your department **for more than twenty years**, and the unmistakable inference that the Congress which passed the act entertained the same view as to its meaning, I would hesitate to

express a contrary opinion if, as an original proposition, I believed the act capable of being so construed, even though the contrary construction were the more reasonable.

"However, upon the various considerations above stated, it is my opinion that:

"First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and,

"Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization."

It appears also from Mr. Wickersham's opinion (pp. 96-97) that the question had been passed upon August 10th, 1889, by Mr. Hepburn, then solicitor of the treasury, and again on November 15th, 1910, by the solicitor of the treasury of that time. Both these officials expressed the idea that a national bank was restricted to one office or banking house in the place designated in the certificate of organization.

The course of conduct of national banks relative to branches, the attitude of Congress relative thereto, and the rulings and attitude of the treasury depart-

ment have fixed a positive policy of limitation against branch banks in the United States since 1863. That policy has been recognized by this Court.

In **First National Bank v. Hawkins**, 174 U. S. 364, l. c. 369, the Court said:

“Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and business men deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. **The smaller banks, in such a case, would be, in fact, though not in form, branches of the larger one.**”

This case which involved the right of one national bank to own the stock of another national bank recognizes the intention of the law that each bank should be an independent institution and that this purpose would be defeated if one bank could hold the stock of another, making the bank whose stock was held in effect a branch of the other.

In **First National Bank v. National Exchange Bank**, 92 U. S. 122, the question of whether a national bank

had implied power to deal in stocks was involved, there being no federal law expressly granting such power. The Court said:

"Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant such power."

Attorney-General Wickersham was clearly right in his conclusion that under federal law a national bank was not only not authorized but was also impliedly prohibited from engaging in branch banking.

In the 1922 supplement to Pratt's Digest of Federal Banking Laws, 1920 edition, which supplement contains all amendments and new rules and regulations to **November 1, 1922**, it is said (p. 7, sec. 7):

"Additional Offices of National Banks.—Note to Sec. 109, page 100, Pratt's Digest 1920.

"The Comptroller of the Currency is permitting national banks located in large cities in states where state banks or trust companies have offices, agencies or branch banks, to establish additional offices in the same city where their principal office is located. Each case will be considered on its merits and applicants should show conclusively competition of state institutions, with branches, and the need for additional offices in order to meet such competition.

"A showing should be made also as to the necessity for an office in the locality where it is proposed to locate.

“The following quotation from a recent letter of Comptroller of the Currency Crissinger to Senator McCormick, sets forth the Comptroller's position in this matter:

“‘I am not authorizing the establishment of branch banks, but have been permitting national banks in states where state banks and trust companies have offices, agencies or branch banks to establish additional offices in some of the large cities where it is necessary to meet the competition of state banks that have literally taken possession of cities with branch banks or offices, and these facts are notorious and are well known to all state bankers of the country.’”

If the foregoing evidences, coeval with the present national bank system, do not show a uniform and consistent and settled departmental construction, it is difficult to conceive how a departmental construction is to be established.

Such was the status on October 2, 1923.

On October 3, 1923, Attorney-General Daugherty furnished an opinion to the Secretary of the Treasury, concluding as follows:

“First: National banking associations have the power to open and operate offices at places other than their banking houses, within the place specified in their organization certificate, for the

performance of such routine services as the receipt of deposits and the cashing of checks for their customers.

“Second. National banking associations have no authority to open offices for the purpose of receiving deposits, paying checks, etc., outside of the limits of the city or place designated in the organization certificate as the place of its operations of discount and deposit.”

The opinion of the Attorney-General is set out in full in the petition of plaintiff in error for modification of order on reargument. We respectfully submit that the first of the conclusions above set forth is not warranted by any of the cases cited. In *McCormick v. Market National Bank*, 165 U. S. 538, there was an attempted organization of a national bank. Before the association was authorized by the Comptroller to commence the business of banking it entered into a lease of premises to be used as its banking house. It never perfected its organization and threw up its lease. It was decided that the lease was void as in violation of the provision of the Banking Act that “No such association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.” The making of the lease was the transaction of business, and being pre-

maturely done, was void. The question here in dispute was in nowise involved in the case.

The opinion of the Attorney-General did not persuade the Comptroller of the Currency, for on the same day, in testifying before the Joint Committee of Congress on Membership in the Federal Reserve System he said:

"I am of the opinion that the Comptroller could not properly permit the establishment of these outside activities by a national bank such as teller's windows in any locality where the state laws or practices prohibit the state banks from rendering similar services."

And ever since the opinion of the Attorney-General the uniform attitude of the Comptroller has been in accord with the ancient usage, to refuse permission for the establishment of branch banks or offices where branch banks were not allowed by the laws of the State.

The Attorney-General limits the authority which he finds for the operation of offices by a national bank at other than its banking house to "the performance of such routine services as the receipt of deposits and the cashing of checks for their customers," this being "the transaction of business of a routine character, which does not require the exercise of discretion." We cannot concur in this view. Routine business is

usual and regular business, and this can be and should be carried on at the regular place of business. And while routine, the conduct of this business does require discretion, both as to the taking in and the paying out of money. A bank has many more depositors than borrowers. Its borrowers, too, can usually take care of themselves. The depositors are in need of protection, and the law recognizes this and makes provision for it. The more places of deposit a bank has the more difficult will be the work of its examination.

Branch banking power should not be implied in the State of Missouri, because to do so is to imply that Congress intended to destroy Missouri state banks and nullify the Missouri policy as expressed in its statutes.

It is argued that national banks need this power to enable them to compete with state banks which possess it. As the law is being administered, banks in Missouri, state and national, are on an equal footing, neither having an advantage over the other. Implying such power in national banks in states where state banks do not possess it is to annihilate state banks, and no such power should be held to exist by implication.

As indicative of the attitude of the national government that national financial institutions cannot take an annihilative attitude toward state banking

institutions, this Court recently, in the case of **American Bank v. The Federal Reserve Bank**, 256 U. S. 350, held that a state bank in an injunction suit could enjoin the Federal Reserve Bank from what the Court characterized as unwarranted "warfare upon legitimate creations of the state."

In **First National Bank v. Fellows, Attorney-General ex rel.**, 244 U. S. 416, the case in which national banks were held to be authorized to engage in fiduciary activities in states where that was permitted to state banks and trust companies, the Court said (l. c. 425):

"From this it must also follow that, even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies or others which by reason of their business are rivals or quasi-rivals of national banks are permitted to carry on such business. This must be, since the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general sub-

ject of regulating the character of business just referred to is peculiarly within State administrative control, State regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

From this it appears that the authority of a national bank to engage in fiduciary activities must necessarily differ in different States. A national bank in one State will have certain fiduciary powers and in another State those powers may be either greater or less.

The Court thus recognized that state and national banks operate in the same competitive field.

Every consideration, including that of competition is against the implication of a power in a national bank to establish branch banks or offices in St. Louis, Missouri.

National banks of New York City have filed briefs in this cause as *amici curiae*. On that account, it becomes necessary to consider in this connection the situation of New York City national banks as contrasted with national banks in St. Louis, Missouri.

THE NEW YORK CITY SITUATION.

By Sections 51 and 110 of the Consolidated Laws of the State of New York, known as the Banking Law, New York permits a state bank in New York City to establish a branch bank, provided it applies for and receives from the State Superintendent of Banks an authority in the nature of a certificate of public necessity, approving the location at which the state bank seeks to engage in banking at its branch bank, and provided that there be a capitalization of \$100,000 set aside for the branch bank. New York has in these sections to a considerable extent made the branch bank of the state bank an independent institution having its own capital. New York has thus approved for its state the policy that state banks in New York City may engage in branch banking under the limitations and the restrictions enumerated in its statutes.

The Comptroller of the Currency has allowed national banks in New York City to have branch banks to meet the competition of the state banks. The Comptroller of the Currency, prior to the month of October, 1923, had not authorized branch banking by national banks in New York City, but had "allowed" such branch banking there. The attitude of the Comptroller until October, 1923, was an attitude of tolerance. The brief filed herein by John A. Garver, Esq., as counsel for the National City Bank of New

York and the Chemical National Bank of New York, in effect, concedes that national authority does not exist for branch banking by national banks, for at page 20 of that brief he says:

“The suggestion naturally occurs that if Congress intended that national banks should have the right to maintain a number of branch offices in a city for the more convenient transaction of the various kinds of business arising in different localities, it would be a simple matter to have the act amended by expressly conferring this power upon the banks. The conditions, however, are such that there is no hope of obtaining an amendment of this kind.”

He then proceeds to show the reason why. The effort then of these two New York banks in this case is apparently to secure from this Court a construction authorizing branch banking by them in New York City that could not be obtained in the shape of a law from Congress.

To meet the New York City and other similar situations, there was introduced in Congress by Mr. McFadden (now Chairman of the Joint Committee on Inquiry of Membership in Federal Reserve System), in the Sixty-seventh Congress on May 16, 1920, a bill “To amend Sections 5155 and 5190 of the United States Revised Statutes, relating to branches of na-

tional banking associations, and for other purposes.”
That bill is as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 5155 and 5190 be, and hereby are, amended to read as follows:

“ ‘Sec. 5155. That it shall be lawful for any bank or banking association, organized under state laws and having branches, and converted into a national bank association as provided by Section 5154 of the United States Revised Statutes, to retain and keep in operation its branches or such one or more of them as it may elect to retain: **Provided,** That in addition to the amount of capital required by Section 5138 of the United States Revised Statutes, each such bank shall have a paid-in capital equal to at least 50 per centum of the capital required by section 5138, for the organization of a national bank at the location of the branch or branches, for each existing branch.

“ ‘Sec. 5190. The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate: **Provided,** That with the approval of the Comptroller of the Currency and of the Secretary of the Treasury, and when authorized by vote of shareholders owning not less than two-thirds of its capital stock, any national banking association may establish and maintain one or more branches in the same city, town or county in which the association is located: **Provided, further,** That the

capital of the association shall exceed by 50 per centum, for each branch so established and maintained, the capital required for the establishment of a national banking association as provided by Section 5138 of the Revised Statutes at the location of the branch or branches: **And provided further,** That in no case shall a national banking association establish or maintain more than twelve branches under the provisions of this act: **Provided, however,** That authority to establish branches shall only be granted to national banks located in states, the laws of which permit the operation of branches by state banking institutions.' "

Notwithstanding the McFadden bill was pending in Congress for nearly two years before the final adjournment of its last session, it failed to receive the approval of Congress.

This proposed legislation that has failed to be enacted, it will be noted, has reference only to a national bank engaged in a locality where state banks have, from the state, authority to engage in branch banking.

It has, of course, absolutely no reference to a state like Missouri where branch banking is prohibited by law.

The situation of national banks in New York City cannot be confused with the situation of the plaintiff in error in the City of St. Louis.

On October 26th, 1923, Comptroller Dawes, in view of the opinion rendered on October 3rd, 1923, by Attorney-General Daugherty, issued new branch bank regulations which, following the opinion of Attorney-General Daugherty, authorize offices for the "routine" business of receiving deposits and cashing checks in New York City.

This regulation is a construction that allows national banks on securing approval from the Comptroller to have branch offices for "routine" banking business. This new regulation does not authorize the establishment of any additional offices "in localities where the other banks are prohibited from enjoying similar privileges," so that plaintiff in error, under this regulation, could not secure from the Comptroller permission to operate branch banking offices for "routine" business in St. Louis, because the Missouri statutes prohibit state banks from having any such branch banking offices. The new October 26, 1923, regulations of Comptroller Dawes follow:

**"Regulations of the Comptroller of the Currency
Relating to Establishment of Additional
Offices by National Banks.**

"1. Under authority of the National Bank Act, as construed by the Attorney-General in opinions rendered May 11, 1911, and October 3, 1923, respectively, the Comptroller of the Currency will

permit national banks, under the conditions hereinafter set forth, to establish one or more additional offices.

“2. A national bank will be permitted to establish such an office only in a city in which other banks are engaged in, and under existing law or regulation are permitted to engage de novo in, banking practices which make it necessary for the national bank in question to operate such an office in order effectively to conduct its banking business.

“3. National banks will be permitted to establish such offices only within the limits of the city, town or village named in its organization certificate as the place where its operations of discount and deposit are to be carried on.

“4. A national bank desiring to establish and to operate one or more additional offices shall make application therefor to the Comptroller of the Currency on a form prescribed or approved by him in which shall be set forth, among other things, the following:

“(a) The number of offices and the proposed street location or vicinity of each.

“(b) A statement of the condition of the applying bank as of the date of application.

“(c) The number of banks with branches or additional offices in operation in said city.

“(d) A statement of the facts and conditions which, in the opinion of the board of directors, make it necessary for the applying bank to establish the proposed office or offices.

“5. Each application for one or more additional offices shall be accompanied by a certified

copy of a resolution of the board of directors showing that such application has been submitted to and approved by the board.

“6. After the Comptroller has approved the application of a national bank for one or more additional offices and before such office or offices are opened for business, a statement shall be transmitted to the Comptroller showing the street location, the purchase price paid, the annual rental cost, and the cost of equipment for each such office.

“7. Operations of additional offices of national banks established under these regulations shall be confined to the receipt of deposits and the payment of checks and other such routine or administrative functions.

“8. No investment in bonds or other securities for the account of the bank shall be made at any such additional office.

“9. No loan or discount shall be made to any customer of the bank through any such additional office that has not been authorized at the banking house by a resolution of the board of directors, or by an appropriate committee of such board, or by an officer or officers acting under authority from such board, and no general authority issued by the board of directors shall vest in any officer or employe at such additional office any discretionary authority with reference to making such loans or discounts.

“10. A statement of the business conducted at such offices shall be transmitted to the banking house as of the close of business daily, shall be

incorporated on the books at the banking house at regular intervals, and shall enter into all statements of the condition of the bank."

The Comptroller's letter of publication transmitting the regulation to the national banks of the country is as follows:

"Dear Sir:

"The Attorney-General in an opinion dated October 3, 1923, has made the following ruling:

" 'A national banking association may establish in the city or place designated in its certificate of organization, an office or offices for the transaction of business of a routine character which does not require the exercise of discretion and which may be legally transacted by the bank itself. It may not, however, establish a branch bank doing a general banking business such as is usually done by national banks. The establishment of such a branch would be illegal and subject the offending bank to the forfeiture of its charter.'

"In this connection the Attorney-General further held that the manner of the exercise of the incidental powers, by virtue of which under the law, national banks are permitted to establish such offices, must be exercised 'subject to the supervision of the Comptroller of the Currency.'

"In the opinion rendered by Attorney-General Wickersham May 11, 1911, it was held that a

national bank is not authorized under the National Bank Act to establish a branch bank for the purpose of engaging in a general banking business; that the establishment of such a branch would be illegal and would subject the offending bank to the forfeiture of its charter.

“This view is confirmed and restated in the opinion of October 3rd, in which Attorney-General Daugherty elaborates the earlier opinion by making a distinction between the discretionary powers of a national bank (that is to say, the corporate powers of the bank as exercised by its board of directors) and the purely routine or administrative functions which may be performed by the bank employees. Upon this theory, while denying to a national bank the power to maintain a branch bank in which the discretionary authority of the board of directors could be exercised, he held that a national bank might establish an office or offices within the city or town in which the bank is located, at a distance from its banking house, and at or through such office or offices the bank might perform routine or administrative functions, leaving the discretionary authority of the bank to be exercised solely at the banking house.

“The right or power to establish such additional offices in the city or town in which the bank is located, not being expressly authorized by statute, but being an implied incidental power, and the functions to be performed through such offices, in the opinion of the Attorney-General, being limited to routine or administrative functions, it is necessary for the Comptroller of the Cur-

rency in the exercise of his general supervisory powers to prescribe regulations in which are set forth the conditions under which such offices may be established and operated.

“While the opinion of the Attorney-General permits the Comptroller of the Currency to afford a measure of relief to national banks in certain cities where local banking practices have put the national banks to a disadvantage, he could not properly permit such national banks to establish additional offices without restriction, or in localities where the other banks are prohibited from enjoying similar privileges. The establishment of such offices, being an exercise of an implied power, must be exercised only where an actual necessity exists in each instance and only after approval by the Comptroller of the Currency.

“Where a bank desires through such offices to exercise particular administrative functions not dealt with in existing regulations, an application should be made to the Comptroller of the Currency for a special ruling.

“With reference to applications to the Comptroller by national banks for permission to establish such an office or offices, the Comptroller will not take into consideration as a reason for his approval the fact that a bank has, prior to making such application, invested funds in property for the purpose of securing a site or sites therefor.

“The above-mentioned opinion of the Attorney-General and the regulations of the Comptroller of the Currency, to which reference is herein made, have no application to branches of national

banks acquired under the provisions of the Act of March 3, 1865, by virtue of which a state bank, having branches, may convert into a national bank and elect to retain its branches; nor to branches of national banks acquired as a result of the consolidation of national banks under the provisions of the Act of November 7, 1918, under which the branches of one or more of such consolidating banks, having been acquired under the Act of 1865, above referred to, may be retained by the national bank resulting from such consolidation.

“A copy of the regulations of the Comptroller of the Currency relating to the establishment of additional office, together with application to establish such office is enclosed.

Yours very truly,

Henry M. Dawes,
Comptroller of the Currency.”

Branch banking as a general system for the country was the subject of controversy for many years, but the country definitely determined against it. Any authorization of branches under the present National Bank Act was to conserve existing rights or to meet peculiar situations. So far as the history of the subject goes there does not appear to have been prior to this case an assertion of right, by any national bank under the present system, to establish by force merely of its own volition more than one banking house or office, regardless of what the policy might be of the state in which it was located.

II.

**BRANCH BANKING IS IN CONTRAVENTION
OF MISSOURI LAW.**

Branch banking by a national bank in Missouri, as conduct in excess of any authority granted by the nation, is conduct expressly prohibited by and is in contravention of the Missouri Banking Law.

“Sec. 11684. **Prohibition of banking business.**— No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state **or of the United States, except as permitted by such laws,** shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a trans-Atlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise (Laws 1915, p. 108).”

**Revised Statutes of Missouri of 1919, Article
I of Chapter 108.**

Missouri thus prohibits acts by either national or state banks that are in excess of their authority.

Branch banking by a national bank in Missouri is in violation of the law of the state because without federal or state authority.

(See copy of opinion in this case of Walker, J., in Tr. of Rec., p. 1, 249 S. W. 619.)

The conduct of the branch banks, therefore, is in violation of the laws of Missouri, since it amounts to the conduct of a bank without either state or federal authority. It also violates the Missouri statute relating to branch banks, as held by the Supreme Court of Missouri in this case.

The policy of Missouri is against branch banking.

The section expressly prohibiting branch banking is as follows:

“Sec. 11737. **Rights and powers.**—Every such corporation shall be authorized and empowered:

“1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also by buying, investing in, selling and discounting negotiable and non-negotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for

all loans and discounts made, such corporation may receive and retain in advance the interest; **provided, however, that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house."**

Revised Statutes of Missouri of 1919, Article II of Chapter 108.

Missouri thus prohibits branch banking and the Supreme Court of the state has construed this to mean that a bank's banking business shall be conducted in one banking house, for it granted the relief prayed for by the State which was that:

"Respondent be ousted from the privilege of operating its said branch bank or any other branch banks and from conducting a banking business at any place or location other than one banking house or office maintained by it for such purposes."

III.

BRANCH BANKING BY NATIONAL BANKS IN MISSOURI IS UNWARRANTED WARFARE UPON THE STATE BANKS OF MISSOURI, OPPRESSIVE AND DESTRUCTIVE IN ITS CHARACTER.

Obviously to permit one system of banks to maintain and operate branch banks while this is denied to another system is to place that other system at a

great disadvantage. As a consequence in whatever states the state banks are possessed of this authority it is exercised by them, and the like authority is sought by the national banks. The adverse effect of the branch bank system where state banks are authorized to engage in it, is pointed out by former Comptroller Crissinger in his testimony before the McFadden Committee. He instances places like Atlanta, Detroit, San Francisco, Oakland, Los Angeles, New Orleans, Baltimore and Cleveland, where, under the operation of a state branch bank system, the national banks have diminished in number and importance, and it is to remove the inequality of such conditions that the McFadden bill is proposed, giving the national banks authority to operate branch banks in states wherein the state banks have it. If, as now contended, the federal statutes, as they stand, confer such authority, the enactment of the McFadden bill is unnecessary, and protection against the system is needed, not by the national banks, but by the state banks in states which deny the right to their own creatures. The result of such a construction will be that all the states must grant the authority to their own institutions or expose them to unequal and destructive competition, with the result that we will have a universal system of branch banking when very clearly nothing of the kind was intended by the National Bank Act. It is a fair as-

sumption that if Congress had intended to establish such a system, it would have declared its intention in plain and express terms and not have left it to an implication so obscure that half a century would pass before the power was asserted under the National Bank Act. But until now, whenever the pressure of the unequal competition became too great, the national banks changed to state banks, never thinking that they could get relief under federal law. How thoroughly grounded was the view that branch banking was not authorized by federal law is shown by the statement of Mr. Crissinger that "we have lost in the State of California, I suppose, forty big national banks in the last eighteen months." He testified further that the logical effect of the branch banking system was "to destroy the small independent banks and to have fewer of the banks."

Comptroller Dawes in his testimony before the same committee demonstrates by a showing of the results, in countries which have adopted the branch system, that the system is antagonistic to independent unit banks, because in its essence it is monopolistic. Wherever it is in vogue the number of banks is very limited, while the number of branches is very great. He believes that the branch system is a dangerous one, and not suited to our conditions. The rapid economic development of this country "has been largely due to the policy of the pioneering

unit banks." He makes clear that there was not lurking and inherent in our National Bank Act a principle by implication which is absolutely destructive of what for more than a half century was believed to be its manifest policy.

Whatever may be the remedy that should be applied in states which authorize branch banking, whether the power should be extended to national banks or withdrawn from state banks, in states like Missouri, where branch powers are denied to state banks, the solution is clear, the independent unit system should be maintained and there is no warrant for inference, implication or construction that the power to conduct their regular banking transactions, those of deposit or discount, could be extended beyond the one banking house of each national bank. As to this Comptroller Dawes expresses himself very distinctly:

"I am of the opinion that the Comptroller could not properly permit the establishment of these outside activities by a national bank, such as tellers' windows, in any locality where the state laws or practices prohibit the state banks from rendering similar services."

Comptroller Dawes also points out the dangers in-

cident to a branch system and particularly as to safeguarding funds. He says:

“The examination of an institution with branches and subsidiaries is a very difficult one. The interdepartmental relationships vastly complicate it. It is more difficult to examine ten institutions of a given size which are associated in a branch banking system than it would be to examine ten independent institutions, as all of the transactions between the different branches have to be investigated and eliminations and adjustments made to produce a composite picture and prevent the improper manipulation of shifting of assets. This cannot be done satisfactorily without a simultaneous examination of parent bank and each one of the branches. This may be construed as an ex parte statement, but it bears the weight not alone of my individual opinion, but of the employes of the Comptroller's office who have been engaged in the examination of banks for many years. Bank examination involves very much more than a mere scrutiny of figures, questions of moral character, of local reputation, of valuations of securities, of conformity to local laws and rulings—these and many other elements enter into a proper examination. In the case of the examination of a very large bank, say with 75 to 100 branches, it would be impossible to mobilize a force of examiners of the ability to make an intelligent analysis of the situation in each individual community, even if it is to be assumed that the character of the banker is not a factor in the condition of the institution.”

IV.

THE STATE HAS AUTHORITY TO ACT.

The State, when its action is not in conflict with national law, can suppress unauthorized, unlawful conduct of a national bank in the State.

A.

Acts of a National Bank in a State Which Are in Excess of Any Authority From the Nation and in Contravention of State Law Can Be Stopped by the State.

The Nation, of course, can also question and stop such conduct.

The State has no authority to cut down any of the bank's authorized activities.

In the case under consideration the act of the national bank in the State is an act in excess of any authority from the Nation and is in contravention of State law.

The branch banking of plaintiff in error in Missouri, as conduct in excess of any authority from the Nation, as conduct in contravention of Missouri law and as conduct amounting to unwarranted warfare upon competing Missouri state banks, is conduct either the Nation or Missouri can stop.

In *First National Bank v. Fellows*, Attorney-General, ex rel., 244 U. S. 416, it was held that the new power given by Congress to national banks to engage in fiduciary activities "when not in contravention of local or State law" was subject to regulation by the State, provided the State laws were not discriminatory. Mr. Chief Justice White in this connection said (l. c. 425):

"Of course, as the general subject of regulating the character of business just referred to is peculiarly within State administrative control, State regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers."

It is clear a State can and does control the fiduciary activities of a national bank in a State by State laws that are not discriminatory.

The laws of Missouri prohibiting banking excesses are not discriminatory, but apply equally to state and national banks. Why, then, may not the State stop the unauthorized unlawful branch banking of a national bank within its borders?

This Court said, in *Bank v. Kentucky*, 9 Wall. 353, that

“National banks are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation.”

In *McClellan v. Chipman*, 164 U. S. 347, the Massachusetts statute forbade preferences by transfers of property in cases of insolvency, while the National Bank Act authorized national banks to take mortgages and conveyances of real estate for previous debts. It was strenuously insisted on behalf of the national bank that the two laws were in conflict. The previous cases were carefully considered and those in which the state authority was upheld and those in which it was denied clearly distinguished.

The Court said (l. c. 356):

“The only federal question for our consideration is whether there was conflict between the statutes of the United States and the provisions of the general law of the State of Massachusetts referred to and heretofore fully set out. Two propositions have been long since settled by the decisions of this Court:

“**First. National banks** ‘are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their ac-

quisition and transfer of property, their right to collect their debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the governmental that it becomes unconstitutional' (First Nat. Bank v. Kentucky, 76 U. S., 9 Wall. 362).

"Second. 'National banks are instrumentalities of the Federal Government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created' (Davis v. Elmira Sav. Bank, 161 U. S. 283).

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

We submit that the present case is within the rule and not within the exception, for the state law is in harmony with the federal law, and it cannot be said

that the state law impairs the efficiency of operation of the national bank when it does no more than prohibit what it has no right to do.

There is no conflict, in the case under consideration, between the statutes of the United States and the law and policy of Missouri.

As the opinion of the Supreme Court of Missouri in this case points out, the case of **First National Bank v. Commonwealth**, 143 Kentucky 816, 34 L. R. A. (N. S.) 54, 137 S. W. 518, is relevant. In that case the question involved was whether land not used by a national bank for its national banking business could be escheated under the Kentucky law, to the State of Kentucky.

The National Law, U. S. R. S. Section 5137, provided that a national bank should not hold land other than that used for its banking business beyond a period of five years. Similarly, the state law also provided that land not so used, held beyond such time, would be escheated to the state.

In this situation the State of Kentucky proceeded against a national bank in Kentucky to escheat land not used for banking purposes, held beyond the periods fixed in the national and state laws. The Court held that the land could be escheated to the state. Objection was made that the bank was an agency of the federal government; that Congress had

provided a complete system of control and regulation, and that the state had no authority to in any manner interfere with the affairs of national banks, and that state laws applicable to domestic and other corporations were wholly inoperative as to national banks, and that the state was without power to limit the quantity of real estate a national bank might own and hold. The following discussion of this question was had, and the Court states in conclusion (57 l. c.):

“In other words, our opinion is that, while the state cannot, by either constitution or legislation, directly or indirectly, regulate or control the organization or conduct of national banks, so as to interfere with the legitimate business for which they were created, its laws applicable to banks and other corporations may be invoked against national banks when they attempt to exercise rights or do things outside the scope of the business they were created to carry on, and that are not essential to their existence or efficiency. **We think that when a national bank exceeds the purpose of its creation and goes beyond the scope of its functions as a national banking institution that the state may deal with such of its transactions as are in excess of the authority conferred by Congress and in violation of the laws of the state, as it would deal with the business or property of any other banking corporation.**”

The Court, in reaching this conclusion, discusses and relies on the cases of *Davis v. Elmira Savings Bank*, 161 U. S. 275; *McClelland v. Chipman*, 164 U. S. 347, and *Bank v. Kentucky*, 9 Wall. 356.

A state has under this Kentucky case, and should have, the right to question acts **in excess** of both national and state authority which are committed in the state.

It is urged that the case of **First National Bank of San Jose v. State of California**, U. S. Sup. Ct. Adv. Sh. 1922-23, p. 691, is authority to the contrary of the case of **First National Bank v. Kentucky**, *supra*. Instead of that being true, it appears that this court recognizes that a State cannot attempt to define the duties or control the conduct of a national bank **when such attempt conflicts with the laws of the United States or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created.**

In the California case, Mr. Justice McReynolds pointed out that the depositor deposited funds with the bank with the understanding that on demand from the depositor, the bank would repay. With this contract in existence the State of California passed a law to escheat funds in banks held for a period of over twenty years. The Court states:

“Obviously, it attempts to qualify in an unusual way agreements between national banks

and their customers long understood to arise when the former received deposits **under their plainly granted power.**"

In the Kentucky case the bank **had no authority** under either state or national law to hold the land for more than five years, while in the California case the bank had the right to make and did make an agreement of deposit under which there was no period of time which would bar the right of the depositor to reclaim his deposit or bar the right of the bank to hold the deposit subject to demand.

In the Kentucky case, Kentucky acted in accord with national law and policy.

In the California case, California acted in conflict with national law and policy.

In this, the Missouri case, Missouri is acting in accord with national law and policy.

B.

An Unauthorized, Unlawful Act of a National Bank in a State Should Stand Upon the Same Footing as the Unauthorized Unlawful Act of Any Other Corporation.

It is clear Missouri has authority to question and to stop the unauthorized, unlawful act in Missouri of a Missouri corporation.

It is clear that Missouri has authority to question and stop the unauthorized, unlawful act in Missouri of a corporation of another State.

**Standard Oil Co. v. Missouri ex rel., Hadley,
224 U. S. 270.**

No reason is perceived why the act in the state of a national corporation, even though a national agency, which is in excess of any authority from the Nation and contravenes state law, should not be regarded in the same light as an unlawful and unauthorized act of a foreign corporation.

The State certainly has authority to act when as here the State acts not in conflict with any law or any policy of the Nation, but entirely and in full accord with its every purpose. Nation and State are here co-operating to achieve the same desirable end—a safe banking system of independent and competing units.

C.

A National Agency Is No More Free From Responsibility to the State for Unlawful Acts Done in the State Beyond the Scope of Its Powers and Authority Than Is a National Agent.

In *Ex Parte Siebold*, 100 U. S. 371, were involved the election laws of Maryland and of the United

States. Judges of election appointed under a statute of the State were convicted of violations of the federal statute, which made it a penal offense for officers of election, at an election held for a representative in Congress, to neglect to perform or to violate any duty in regard to such election whether required by a law of the State or of the United States. It was contended on behalf of the petitioners:

1. That the power to make regulations respecting the election of members of Congress granted to Congress by the Constitution was an exclusive power when exercised by Congress.
2. That this power when exercised must be so exercised as not to interfere or collide with regulations in that behalf made by the State, unless it provides for the complete control over the whole subject over which it is exercised.
3. That when put in operation by Congress, it must take the place of all State regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by Congress.

The Court said:

“We are unable to see why it necessarily follows that, if Congress makes **any** regulations on the subject, it must assume exclusive control of the **whole** subject. The Constitution does not say so.

• • • • •

“Another objection made is, that if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency—at the suit of the State and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. **Where a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account.** Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act need not now be decided, although considerable discussion bearing upon the subject has taken place in this court tending to the conclusion that such a plea cannot be sustained.

* * * * *

“The true interest of the people of this country requires that both the National and State Governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.”

We submit as closely analogous to the instant case, that of **United States v. Lee**, 106 U. S. 196.

Lee was the owner of certain land in Virginia, which at the time of the suit, was held and occupied by the United States in part, as a national cemetery and in part as a military station, Kaufman, Strong and others being the officers and agents of the United States by whom the land was held. The title relied upon by the defendants was a tax-sale certificate made by Commissioners of the United States appointed under an act of Congress for the collection of direct taxes in the insurrectionary districts within the United States. If the sale underlying the certificate was a valid sale, the United States, which had bid in the land, had a good title to the land; while if the sale was not valid the title of the United States was void. Lee brought a suit in ejectment in the Circuit Court for the County of Alexandria, in the State of Virginia, in the form prescribed by the laws of that state. The case was at once removed by certiorari into the Circuit Court of the United States, where the trial was had before a jury, resulting in a verdict for the plaintiff, and from the judgment on that verdict the United States and Kaufman and his codefendants prosecuted writs of error on which the case was brought to this Court. The United States was not a party to the suit, but while defending the case by its proper officers in the court it declined, by its Attorney-General, to submit its rights to the jurisdiction of the court below, protesting that the

Court had no jurisdiction of the subject in controversy and moved that the declaration be set aside and all proceedings stayed and dismissed. The plaintiff demurred to his suggestion, and on hearing the demurrer was sustained. The defendants Kaufman and Strong pleaded the general issue. In the course of the trial the suggestion of the Attorney-General was again presented to the Court and again refused. It was found and determined in the case that the United States had acquired no title under the tax sale proceedings.

The great question in the case, however, was as to the right of the plaintiff to sue. The Court made this clear statement of the question:

“The counsel for plaintiffs in error and in behalf of the United States assert the proposition that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the Court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.

“This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without

such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the Government."

The opinion, which is by Justice Miller, is a very elaborate one, and makes a comprehensive review of the authorities and finds in them no ground for denying jurisdiction in the case as against Kaufman and Strong, and passing from this review, he says:

"The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

"In the case supposed, the Court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a case within the

meaning of that term, as employed in the Constitution and defined by the decisions of this Court. It is to be presumed in favor of the jurisdiction of the Court that the plaintiff may be able to prove the right which he asserts in his declaration.

“What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the Court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

“It is not pretended, as the case now stands, that the President had any lawful authority to do this, nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation.

* * * * * *

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it."

Consider the facts of this case. The land in question was occupied by the United States, and it did assert title thereto. Kaufman and Strong were officers of the United States, and by direction of superior officers of the Government they assumed to hold this land. How then, could the suit be maintained by Lee? Because mere unfounded assertion of right and authority in the United States was not enough. If, upon examination, it was found, and there must be examination to make any finding, that the asserted right and authority did not exist, that the assertion of them was sheer usurpation and every act in exercise of them a trespass, then, despite their assertion, despite their appointment and commission, despite all directions of their superiors, as to this matter they were not officers of the United States nor in the exercise of any duties as such, and hence they were amenable as individuals to the law of the land.

To deny the right of the State to question and to put a stop to an act of the character here involved is

to make a national bank superior in power and dignity to the State in which it operates.

Threatened acts of a federal agent to carry into effect an unconstitutional law are subject to be enjoined:

- Wilson v. New**, 243 U. S. 332;
Hammer v. Dagenhart, 247 U. S. 251;
Kennington v. A. Mitchell Palmer, 255 U. S. 100;
Tedrow as U. S. District Attorney v. Lewis & Son Dry Goods Co., 255 U. S. 98;
State of Missouri v. Holland, U. S. Game Warden, 252 U. S. 416.

Similarly, agents of the State are subject to restraint.

- Osborn v. United States Bank**, 9 Wheat. 737;
Ex Parte Young, 209 U. S. 123.

The instant case presents no challenge as to the legality or constitutionality of any act of Congress, but simply asserts the usurpation of a right or privilege which has never been established or recognized by Congress or by the State of Missouri. The branch banking of the bank in the case under consideration has not even the color of an unconstitutional law to sustain it. It is wholly without authority.

How can it, therefore, be said that Missouri is helpless to stay the aggressions and usurpations of a national banking association doing business in Missouri, when the act complained of is nothing more than the usurpation of a right clearly withheld and not granted to it by any law?

D.

The Same Conduct May Be an Offense Against Both State and National Sovereignty and May Be Restrained by Both Nation and State.

In the case of *Halter v. Nebraska*, 205 U. S. 34, the State of Nebraska had passed legislation of the same character as that passed by the National Congress with reference to paying proper respect to the national flag. It was contended that as the Nation had the right to legislate with respect thereto, and had done so, the State had no right to act and any prosecution under its laws was unauthorized. This Court held that the effort of Nebraska, being in aid and in support of the National Government and in no way in conflict with its purposes, should be upheld.

In *Gilbert v. Minnesota*, 254 U. S. 325, the State enacted legislation in accord with the national legislation known as the Espionage Law, and prosecuted under its law for violation thereof. It was contended that, the United States having taken over the field of

such a vital thing as the army in war, that the State was precluded from legislating or acting judicially in that field.

The Supreme Court, however, through opinion by Mr. Justice McKenna, held that the state legislation of Minnesota must be upheld, as also the particular prosecution under it, for the reason that the aim of Minnesota was to act in support of and to carry out the purposes of the Nation.

In **United States v. Lanza**, U. S. Supreme Court Advance Opinions 1922-1923, p. 169, Lanza had been prosecuted under the State law for a given act that was at the same time an act that violated the national prohibition legislation. The claim was made on his behalf, when indicted under federal law for the same conduct, that he was being put in double jeopardy, in violation of the Fifth Amendment of the Constitution, because he had been prosecuted under the concurrent State law and could not, therefore, be again prosecuted under the concurrent federal law. On this ground the lower court dismissed five counts of the federal indictment against Lanza. This Court held that State conviction was not a bar to national prosecution and conviction for the same act.

There is in this case an elaborate review of the authorities from *Fox v. Ohio*, 5 How. 410, down, and

there is no room left for doubt that although the Nation outlaws an act or course of conduct, a State may do the same. And if this doctrine is carried so far that the result may be to subject a person to be twice punished for the same act, why should not either of the two sovereignties enjoin conduct which is a usurpation against each?

Supporting the full-crew law of Arkansas against the objection that it was an unauthorized regulation of interstate commerce, this Court (*C. R. I. & Pa. Ry. Co. v. Arkansas*, 219 U. S 453, l. c. 465) said:

“It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statute is not to be questioned in a federal court unless they are clearly inconsistent with some power granted to the General Government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature.”

Cases are cited on behalf of the bank in which the right of the State to act was denied, but in these cases there was a conflict between the State and Nation and, of course, the authority of the Nation was paramount.

In *Ableman v. Booth*, 21 How. 506, Booth was indicted, tried and convicted of a violation of the fugitive slave law in the United States District Court of Wisconsin. The Supreme Court of Wisconsin discharged him on writ of habeas corpus, holding that the fugitive slave law was unconstitutional and any conviction under it void. A writ of error being issued by this Court, the Supreme Court of Wisconsin at first refused obedience, but later made return to it. The State court in that case ignored the national law and national authority altogether, not only holding unconstitutional a federal law which this Court had held to be constitutional, but nullifying all the proceedings of a federal court of competent jurisdiction under it.

In *re Tarble*, 13 Wall. 397, young Tarble applied for enlistment in the Army of the United States, representing himself to be more than twenty-one years of age. He was enlisted in due form and sworn in the service. Later he deserted, but was captured and was being held for trial before a court-martial when his father sought his discharge on writ of habeas corpus issued by a state court, the father

alleging in his petition that the son was under the age of eighteen years at the time of his enlistment, which was not consented to by the father, and consequently the detention of the son was illegal. This Court decided that the state court was without jurisdiction to issue the writ, Tarble being claimed and held under color of authority of the United States by an officer of that Government. The exclusive jurisdiction of tribunals of the United States in such cases was held to be essential to the maintenance of the efficiency and integrity of the army organization, for the Court said:

“It is manifest that the power of the National Government could not be exercised with energy and efficiency at all times if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.”

Tennessee v. Davis, 105 U. S. 257, was the case of a revenue officer of the United States indicted for murder in a state court. He applied under the Act of Congress for a removal of his case to the federal court. His petition, under oath, shows that he was a revenue officer, in the actual performance of his duty as such, when he was fired upon by a party of illicit distillers whose arrest he was undertaking, and in necessary defense of himself and in the discharge of his duty he returned the fire, killing one of the hos-

tile party. This was the act on account of which he had been indicted. This Court held that his petition made a case for removal under the Act of Congress, and that the act was valid.

In *re Neagle*, 135 U. S. 55, was the case of the man appointed to guard and protect Justice Field in the discharge of his judicial duties when he was threatened with violence and death by the Terrys, who were litigants before him. As was apprehended, an assault was made upon the Justice, and Neagle, in necessary defense of the Justice, shot Terry down. Mrs. Terry swore out a warrant against Neagle before a Justice of the Peace on a charge of murder, and Neagle was taken into custody. A writ of habeas corpus was issued by the United States District Court, and upon the hearing Neagle was discharged. This Court held, when the case came here, that it was a proper case for the writ as being the case of one "in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof." The Court said that (1. c. 59):

"In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of this phrase."

And what the Federal laws required him to do, the Federal tribunals would protect him in doing.

In *Ohio v. Thomas*, 173 U. S. 276, Thomas was the governor of a soldiers' home which was under the sole jurisdiction of Congress. The State had enacted a law that any person in charge of a hotel, restaurant, eating house, etc., etc., who therein sells, uses or serves oleomargarine shall display in the dining room a large placard announcing "oleomargarine sold and used here." And oleomargarine was not to be served as or for butter when butter was asked for. The Acts of Congress for carrying on the Soldiers' Home showed an appropriation by Congress for the specific purpose of purchasing "oleomargarine as part of the regular rations of the inmates of the home." The Court said (l. c. 284):

"The act of the governor in serving it (oleomargarine) was **authorized** by Congress, and it was therefore legal, any act of the State to the contrary notwithstanding."

In these cases there existed a conflict between the State and Federal authorities. Contrary purposes were being attempted by them. Nothing of the sort obtains here. The conduct of which the State complains has not the sanction of Federal law, and per contra, the State and Federal law are in perfect har-

mony. Enforce the one and the purpose of the other is attained.

E.

A National Bank Is Subject to the Judicial Power of a State.

A case that deserves mention in this connection is that of **Guthrie v. Harkness**, 199 U. S. 148. In that case a stockholder sought inspection of the books of a national bank. The stockholder's attempt to examine the books was resisted on the ground that that was a matter involving the visitorial authority of the National Government, and that the stockholder for that reason could not have an inspection of the books. The courts of Utah, however, upheld the common-law right of the stockholder, and this opinion was affirmed by this Court in an opinion by Mr. Justice Day.

The Court said (l. c. 157):

“But, it is said, the right of the shareholder to inspect the books is cut off by section 5241, providing ‘no association shall be subject to any visitorial powers other than such as are authorized by this title, or **are vested in the courts of justice.**’ ”

The Court proceeds (l. c. 159):

“The right of visitation being a public right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind in passing this section that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. **Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.**

“That the statute did not intend in withholding visitorial powers to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved is evident from the language used. If the right to compel the inspection of books was a well-recognized common-law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class ‘vested in courts of justice’ which are expressly excepted from the inhibition of the statute.”

From this conclusion it would appear that the State, in the proper exercise of its police power, has and ought to have the right to suppress an unlawful

act in the state that is wholly without authority from any source.

In **Hale v. Henkel**, 201 U. S. 43, a corporation of a state was charged by the United States with having violated the national Anti-Trust Law. In connection with that proceeding certain papers were sought, and it was urged that the corporation was a creation of a state, and that the only authority that had the right to examine the papers sought was the state creating the corporation, and that no such visitatorial power existed in the federal government. Mr. Justice Brown, in dealing with this matter of a state corporation acting in the national field of interstate commerce in violation of the national Anti-Trust Law, pointed out that the state corporation in such a case becomes subject to two sovereignties, and at page 75 said:

“It is true that the corporation in this case was chartered under the laws of New Jersey, and that it received its franchise from the Legislature of that state, but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with due regard to its own laws. Being subject to this dual sovereignty,

the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations."

Thus, it appears that though the national government is not the creator of a state corporation, it has, nevertheless, a right, in the nature of a special visitatorial power, as was held in the *Hale* case, over state corporations to the extent they enter the federal interstate field and violate the laws thereof.

The converse of the situation existing in the *Hale* case exists in the case at bar.

In the case at bar a bank is authorized to engage in national banking in the City of St. Louis, Missouri. As to all its authorized operations, the national government has unquestioned exclusive control, to the exclusion of any conflicting state action. The national bank, however, in the case at bar is not engaged in operations within the bounds of its authority, but its operations are activities outside the scope of its authority. Such outside operations are not, of course, national bank operations at all. The

nation, of course, has the right to suppress such outlaw operations.

Such outlaw operations, in the case at bar, happen to be operations, in addition, that are against the laws of the state and that amount to an unwarranted warfare against the welfare of the state and its banking system, and so the state is also interested to protect itself and its banking system from this unlawful aggression.

Missouri, in so acting, is acting in the sphere of its sovereignty, of its police power. To employ the reasoning of Mr. Justice Brown in the *Hale* case, a dual sovereignty exists when acts of a national bank that are non-national bank in character, and are wholly outside its authority, and are prohibited by the state, are committed in a state and are acts that are highly injurious to the interests of the state.

To paraphrase Mr. Justice Brown with respect to such outlaw acts in the state, "the power of the state in this particular, in the vindication of its own laws, is the same as if the corporation had been created by an act of the state."

The State has a right to enforce observance of the laws it has enacted to promote the welfare of the people. Individuals may suffer from the infraction of these laws, and a right of action may accrue to them therefor. But the State in such case may sue in its

own behalf, to enjoin the disregard of its laws, and to protect the interests of all its people.

In *United States v. Am. Bell Telephone Co.*, 128 U. S. 315, it was decided that the United States as representing the general public interest in the subject matter had a right to maintain a suit in equity to annul a patent for an invention alleged to have been obtained by fraud.

In *Marshall Dental Company v. Iowa*, 226 U. S. 460, the State of Iowa sought to enjoin the defendants from draining the waters of a lake in Iowa. It was contended that the bed of the lake belonged to the United States. This was met by a contention that the bed of the lake belonged to the State. In this situation Mr. Justice Holmes said:

"It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against **an intruder without title**, whether the State owns the bed or not. This principle has been affirmed and acted on by the Court so recently that it does not require further argument here (*Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237; *Hudson Water Co. v. McCarter*, 209 U. S. 349, 356. See, also, *Kansas v. Colorado*, 206 U. S. 46, 93; *McGivra v. Ross*, 215 U. S. 70, 79)."

The sixteenth subdivision of Section 24 of the Judicial Code confers original jurisdiction upon the

federal courts of all cases commenced by the United States or by direction of any officer thereof, against any national bank, of cases for winding up the affairs of any such bank, and of all suits brought by a national bank to enjoin the Comptroller of the Currency or any Receiver acting by his direction.

The present suit is not of any of the kinds mentioned.

The same section further provides that:

“All national banking associations established under the laws of the United States, shall for the purpose of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.”

The present suit is essentially one in equity and this provision of the law is broad enough in its scope to include it.

U. S. R. S., Section 5136, defining the powers of national banks, provides the power

“to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.”

U. S. Comp. Stat. 1916, Sec. 9668, p. 11814, provides that excepting suits between national banks and the United States or its officers and agents the jurisdic-

tion in suits by or against such banks shall be the same and not other than, the jurisdiction against other banks doing business where the national banks are doing business when the suit may be begun.

This case is not within the exception of this law.

U. S. R. S., Section 5198, provides that:

“Suits, actions and proceedings against any associations under this title, may be had in any circuit, district or territorial court of the United States within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases.”

The restriction of this last section as to place of suit is a matter of venue rather than of jurisdiction (Martin's Admr. v. B. & O. R. Co., 151 U. S. 673, 688). So far as subject matter is concerned, a very wide jurisdiction is granted.

These acts considered severally and altogether do not exclude the maintenance of the present suit by the State.

Reliance is placed on Section 5239, Revised Statutes, to defeat the authority of the State to act (Brief for the United States, pp. 19, 20, 21, 25, 47, 53, 54, 56). This section provides that a suit to forfeit the charter of a national banking association

shall be brought by the Comptroller in the proper court of the United States "if the directors" * * * "knowingly violate or knowingly permit" the employees of the association "to violate any of the provisions of this title," i. e., of the National Bank Act. And this section also provides that every director shall be liable for damages to all injured on account of such misconduct of the director.

Yates v. Jones Nat. Bank, 206 U. S. 158, is a careful study by Mr. Chief Justice White of section 5239. In that case it was held that under 5239 liability against a director only arose (and therefore ground for forfeiture of the bank's charter can only arise) when the director knowingly violates an "express" provision of the National Bank Act.

The Comptroller, under section 5239, therefore, could not sustain a charge that the directors knowingly violated an "express" provision of the National Bank Act by a showing that the bank engaged in branch banking. For branch banking is impliedly but not "expressly" prohibited by the National Bank Act by reason of the fact no express authority is given for it (92 U. S. 122) and we do not understand the Government or the plaintiff in error to make any contention branch banking is expressly prohibited by the act.

If the directors knowingly violate "express" prohibitions of the act the Comptroller appears, under

section 5239, to have the right to forfeit the charter. He has no authority thereunder to forfeit the charter when the conduct in question falls short of conduct **expressly** prohibited by the act as the conduct of branch banking does in this case.

Moreover, this suit of the State does not seek to forfeit the charter but merely to stop conduct in the state in excess of national authority that contravenes state law. The Comptroller could not sue for the violation by the bank of state law and policy any more than the State could sue to stop an act of the bank that was merely violative of federal law, and which did not in addition violate state law and policy. Section 5239 is not a bar against the State acting in this case.

In the case of **Herman v. Edwards**, 238 U. S. 107, this Court construed Subdivision 16 of Section 24 of the Judicial Code by holding that state courts are possessed of full jurisdiction of all cases of whatsoever character against national banks, except those cases specifically exempted therefrom by subdivision 16 of section 24.

It, therefore, appears that Congress has enacted laws by which its assent has been given, as construed by this Court, to the authority of the judiciary of a state to pass on practically all kinds of questions affecting national banks, except those specifically excepted in the statutes.

F.

Quo Warranto.

The case of **First National Bank v. Fellows ex rel. Union Trust Company**, 244 U. S. 416.

Under Section 11 (k) of the Federal Reserve Act of 1913, a national bank was given the power to engage in fiduciary activities "when not in contravention of State or local law," provided the bank secured a permit from the Federal Reserve Board.

Pursuant to this enactment of Congress, a national bank in Michigan applied for and secured from the Federal Reserve Board a permit to engage in fiduciary activities in the State of Michigan in connection with its national banking business.

The Attorney-General of the State of Michigan, by quo warranto, questioned such activities on the part of the national bank. The Supreme Court of Michigan held that Congress had no authority to grant a national bank the power to engage in fiduciary activities in any State, and that, therefore, the fiduciary activities of the Michigan national bank were without authority, the Federal act being unconstitutional.

On review in the Supreme Court of the United States, the first question dealt with was as to the authority of the State of Michigan to institute and maintain a proceeding of this sort. The right to

maintain such proceeding was upheld on two grounds: (1) that the congressional enactment had in it the provision "when not in contravention of State or local law," and (2) the Court said:

"And our conclusion on this subject is fortified by the terms of Sec. 57, c. 106, 13 Stat. 116, making controversies concerning national banks cognizable in State courts because of their intimate relation to many State laws and regulations, although without the grant of the Act of Congress such controversies would have been Federal in character."

It will be noted that in this case there was authority from Congress, and that pursuant thereto a permit had been given to the bank, and that the action of the State was **in direct conflict** with an act of Congress and with a permit pursuant thereto given by the Federal Reserve Board.

In the case under consideration, in contrast, Congress has given no authority, expressly or impliedly, for the bank to engage in branch banking in the State of Missouri, and the bank has acted wholly without authority of any kind. The distinction, therefore, is that in the Michigan case there was congressional authority and a Federal Reserve Board permit, and yet this Court recognized the right of the State to question the authority of the bank, whereas in the case at bar the First National Bank has no au-

thority from any source to engage in branch banking in Missouri, and it is this conduct, without authority of any kind and in contravention of Missouri law, that the State has questioned and sought to stop.

We have pointed out heretofore that it is not the purpose of the proceeding and it is certainly not the effect of the judgment of the Supreme Court of Missouri to cut down in the slightest degree any exercise by the bank of its authorized powers or affect in the least any of its legitimate activities anywhere.

We have conceded, and there can be no question about the matter, that the only power that can take away from a national corporation authorized activities is the sovereignty that gave the authority in the first place to the corporation.

The Federal Government, alone, for the misconduct of a bank, can punish it by taking from it its authority to engage in legitimate authorized national bank activities. The State, we freely concede, has no such power.

The act of branch banking on the part of the bank is an act wholly without authority from the Nation, so that any stopping of branch banking is not a taking away of any of the authorized activities of the bank.

The branch banking of the bank is, in addition, an act against the laws and sovereignty of the State of Missouri and against its welfare, which, if per-

mitted to continue, will destroy the legitimate creations of the State.

With these two considerations in mind, there can be no question but that the remedy of *quo warranto* may be employed by the State to stop the usurpation against the State. Whatever may be said pro or con against the appropriateness of the remedy, that question is finally settled by the determination of the State Supreme Court that it is appropriate, provided only such remedy meets the requirements of due process of law.

The remedy of *quo warranto* is deemed in Missouri adapted to stop the unauthorized unlawful conduct in the State of a foreign corporation. That conclusion was questioned in this Court in the case of **Standard Oil Company against Missouri ex rel. Hadley**, 224 U. S. 270, in which it was contended that *quo warranto* was a writ, which it was asserted on the one hand was criminal in nature, and on the other hand, that it was civil. These contentions were all brushed aside by this Court in the following language, referring to the Supreme Court of Missouri:

"Its decision and judgment necessarily imply that under that clause of the (Missouri) Constitution it had jurisdiction of the subject matter and authority to enter judgment of ouster and fine in civil *quo warranto* proceedings. That

ruling is conclusive upon us, regardless of whether the judgment is civil or criminal, or both combined."

In other words, it is the view of this Court that the State of Missouri possesses the right to employ a remedy recognized by its courts as proper to redress the wrong committed.

In the **Standard Oil Company** case, *supra*, this Court also held, as to the quo warranto proceedings, that there was no denial of due process of law under the Fourteenth Amendment to the Constitution and that:

"Due process requires that the Court which assumes to determine the rights of the parties shall have jurisdiction and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries, this Court has, up to this time, sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

As quo warranto is the approved means to stop the unlawful act in the State of Missouri of a foreign corporation it would seem available for use to question and stop the unauthorized unlawful conduct of a national bank in the State.

IN CONCLUSION.

It is plain from the history of the National Bank Act that there was no purpose at any time to confer upon national banks generally the power to establish and operate branches in the cities in which they were respectively located. Where, by reason of peculiar circumstances, such branch banks were thought proper, express provision was made for them, as was also done in the case of foreign branches. These exceptional instances expressly provided for made stronger the implication against branch banks generally. If now branch banks are to become a regular feature of our banking system it should be only as a consequence of an express grant of such power made after due deliberation and consideration. And until such grant is made, national banks should not be permitted, by mere assertion and through the mere tolerance of an administrative officer of the United States, to put into practical effect a system of banking banned by the laws alike of the State and the Nation. What is sheer usurpation upon both these

sovereignties is, we submit, subject to repression at the suit of either of them.

Respectfully submitted,

JESSE W. BARRETT,
Attorney-General of Missouri.

ROBERT C. MORRIS,
FREDERICK W. LEHMANN,
HAROLD R. SMALL,
MERTON E. LEWIS,
SAM B. JEFFRIES,
WILLIAM T. JONES,
MARION C. EARLY,

Of Counsel.

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WM. R. STANSBURY

Supreme Court of the United States

OCTOBER TERM 1922

No. ~~219~~

252

FIRST NATIONAL BANK IN ST. LOUIS

Plaintiff-in-error

vs.

STATE OF MISSOURI, AT THE INFORMATION OF
JESSE W. BARRETT, ATTORNEY GENERAL

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF AMICI CURIAE

JOHN QUINN
PAUL KIEFFER
ROBERT P. STEWART
Amici Curiae



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NOTICE OF MOTION FOR LEAVE TO FILE THIS BRIEF.

Notice of the intention of the undersigned and of Messrs. Shearman & Sterling to make an application to this Court for leave to file briefs as *amici curiae* on behalf of certain banks in New York, was duly given in a letter of Messrs. Jones, Hocker, Sullivan & Angert, counsel for the plaintiff in error, to the Attorney General of Missouri on April 19, 1923. Under date of April 20, 1923 the Attorney General replied to Messrs. Jones, Hocker, Sullivan & Angert, counsel for the plaintiff in error, acknowledging the receipt of their letter of April 19, 1923, advising the Attorney General of Missouri that the undersigned John Quinn, and Messrs. Shearman & Sterling, would apply to this Court for leave to file briefs as *amici curiae*.

The application to file this brief is made pursuant to that notice.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922

No. 919

**FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff-in-error**

vs.

**STATE OF MISSOURI, AT THE INFORMATION
OF JESSE W. BARRETT, ATTORNEY GENERAL**

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF AMICI CURIAE

In view of the importance of the questions involved in this cause, particularly with reference to the right of national banks to establish branch offices, the undersigned, who are counsel for the National Bank of Commerce in New York, which is vitally interested in that question, beg to submit this brief as amici curiae.

POINT I

THE STATE OF MISSOURI HAS NO POWER, EITHER BY LEGISLATIVE OR JUDICIAL ACTION, TO LIMIT THE NUMBER OF BANKING HOUSES OR OFFICES OF A NATIONAL BANK, AND THE PROVISIONS OF SECTION 11737 OF THE LAWS OF THE STATE OF MISSOURI, SO FAR AS THE PROVISIONS OF THAT SECTION PURPORT TO BE A LIMITATION UPON THE ACTIVITIES OF A NATIONAL BANK, ARE UTTERLY NULL AND VOID.

The opinion of the Supreme Court of Missouri in this cause held squarely that the attempt of the respondent "to establish a branch bank is not only an act in excess of its corporate powers but in violation of an express Statute" (Record, printed page 15).

The Court below, referring to Section 11684 of the Revised Statutes of Missouri, 1919, held that "Branch banks, not having been permitted by the state law either by express terms or necessary implication, the well recognized canon of construction will authorize the exclusion of this power from those granted."

In an earlier portion of the opinion of the Supreme Court of Missouri, that Court held that the establishment of a branch was in excess of the powers of a national bank under the Federal Law. It then proceeded to state that it was not only an act "in excess of its corporate powers" but that it was an act "in violation of an express Statute", namely, the Statute of Missouri, and hence that the writ of quo warranto invoked by the relator was "an appropriate remedy under the circumstances" (Record, printed page 15).

In order to demonstrate that the opinion of the Supreme Court turned upon the claim that the act of the plaintiff-in-error in establishing a branch bank was "in violation of an express Statute", we may summarize the opinion of the Supreme Court of Missouri briefly as follows:

(a) That the establishment of that branch was in excess of the corporate powers of the plaintiff-in-error under the Federal Statutes.

(b) That it was in violation of the Statute of the State of Missouri.

(c) That a writ of quo warranto was a proper remedy available to the State of Missouri. And

(d) That the State Court of Missouri was the proper tribunal.

The Supreme Court of Missouri in rendering its opinion in this cause enforced the provisions of Section 11737 of the Revised Statutes of Missouri of 1919. But for the provisions of that Section the writ of quo warranto would not have been granted.

It is true that just prior to invoking the provisions of Section 11737 the Court did refer to the provisions of Section 11684 of the Missouri Law. The provisions of that section are that "no corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this State or of the United States, *except as permitted by such laws*, shall by any implication or construction be deemed to possess the power of carrying on the business of" banking or exercising any of the banking powers therein specified.

The Missouri Supreme Court having demonstrated, as it thought, to its own satisfaction, that the act of the plaintiff-in-error in establishing the branch in question was in violation of the Federal Act, then went on to hold that the state law forbade the establishment of the branch because the state law provides that corporations could only transact such business as is permitted by the laws of the United States or of the state.

On this point the Court below said (Record, printed page 15) :

"Branch banks not having been permitted by the state law, either by express terms or necessary

implication, the well recognized canon of construction will authorize the exclusion of this power from those granted".

But the Court then brushes that conclusion aside and says:

"Reliance upon this rule is, however, unnecessary in the presence of a subsequent section (§ 11737, R. S. 1919) in which it is provided 'that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house'. The attempt, therefore, of the respondent to establish a branch bank is not only an act in excess of its corporate powers but in violation of an express statute" (Record, printed page 15).

The decision of the Supreme Court of Missouri raises squarely the question of the extent to which state legislation may control the acts or powers of national banks. The real question is not whether quo warranto is the proper procedure or whether the state court of Missouri was the proper tribunal in which to try out the issues in the case at bar. The question is as to the power of the state of Missouri, however exercised and by whatever remedies or procedure or in whatever court, to direct and control the powers of national banks.

This Court has frequently stated the rules with respect to the limits of state jurisdiction over national banks. That jurisdiction has been stated to be limited to statutes which do not (a) expressly conflict with the laws of the United States or (b) frustrate the purpose for which the national banks were created or (c) impair their efficiency to discharge the duties imposed upon them by the law of the United States.

The Supreme Court of Missouri in its opinion stated (Record, printed page 13) that "The information filed herein by the Attorney-General does not involve the commission of an act in conflict with the laws of the United States nor does it tend to impair the efficiency of any agency of the National government. It cannot, therefore, be said to be in conflict with the rule above announced and hence does not violate it".

We contend that that statement in the opinion of the Court below is erroneous. We contend that an examination of the cases decided in this Court conclusively show that said section 11737 of the Revised Statutes of Missouri is null and void, in so far as it purports to be applicable to national banks.

On this point the Court below reasoned that it had demonstrated that the establishment by a national bank of a branch is *ultra vires* and hence that the processes of the state, by its own statutes, "can be invoked to prevent the exercise of power by a national bank shown to be *ultra vires* under the law of its creation" (Record, printed page 13).

Our contention is that the statute of the state of Missouri under which the Supreme Court of Missouri upheld the writ of quo warranto was expressly in conflict with the laws of the United States and frustrated the purpose for which national banks were created, and tended to impair the efficiency to discharge the duties imposed upon them by the law of the United States, and hence that that section of the Missouri statute is null and void, so far as it purports to govern or attempts to govern national banks.

While the general rule with respect to state legislation

relating to national banks is as above stated, an examination of the cases will show that a more definite rule can be stated by which the validity or invalidity of such state statutes may be determined.

We will consider, first, state statutes relating to national banks, which have been held to be invalid.

Statutes which have been held to be invalid

(1) In *Davis v. Elmira Savings Bank*, 161 U. S. 275 (1895), a New York statute provided for the payment by the receiver of an insolvent bank in the first place of deposits in the bank by savings banks. It was held that when applied to an insolvent national bank it was in conflict with Section 5236 of the Revised Statutes of the United States directing the Comptroller of the Currency to make ratable dividends of the money paid over to him by such a receiver on all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction, and was therefore void when attempted to be applied to a national bank.

This Court based its decision on the ground that (a) national banks are instrumentalities of the Federal Government; (b) that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created; and (c) that both statutes related to the same duty on the part of the officer of the insolvent bank, so that there was on the one hand the

statute of the state of New York, and on the other an exactly contrary statute of Congress and that the New York statute was void so far as it purported to apply to a national bank.

(2) In *Allen v. Carter*, 119 Pennsylvania, 192, a statute prohibiting bank cashiers generally from engaging in any other occupation was held invalid with respect to cashiers of national banks.

(3) In *Easton v. Iowa*, 188 U. S. 220, 229, 237 (1902), the president of a national bank was indicted under an Iowa statute making it a crime for a bank officer to receive deposits in his bank at a time when the bank was insolvent and when such insolvency was known to the defendant. The statute did not in terms apply to a national bank but applied to any bank. It was held that the state was without lawful power to make such a law applicable to banks organized and operated under the laws of the United States.

The Supreme Court of Iowa argued that the acts of Congress provided no penalty for the fraudulent receiving of deposits; that the state statute was in the nature of a police regulation, having for its object the protection of the public from the fraudulent acts of bank officers; that the mere fact that in violating the law of the state the defendant performed an act pertaining to his duty as an officer of the bank, did not in any manner interfere with the proper discharge of any duty he owed to any power, state or Federal; that it was not intended by any act of Congress that officers of a national bank should be clothed with the power to cheat and defraud its patrons; that national banks are organized and their business prosecuted for private gain; and that no reason can be con-

ceived of why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking.

With respect to those contentions this Court said:

"We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States."

The Court held that it was not altogether true that there was no act of Congress prohibiting the receipt of deposits by national banks or their officers when a bank was insolvent; and that there were apt provisions, sanctioned by severe penalties, which were intended to protect the depositors and other creditors of national banks from fraudulent banking.

The Court further quoted from the case of *Prigg v. Pennsylvania*, 16 Peters, 539, as follows:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."

(4) A statute providing that every corporation "formed under the laws of this or any other state" shall

file in the office of the secretary of state a statement of its location and the name of an agent upon whom process must be served, has been held not to be applicable to national banks. *Owensboro First National Bank v. Commonwealth*, 33 Southwestern Reporter, 1105; 17 Kentucky Law, 1167.

(5) The cases with respect to interest and usury as it affects national banks clearly state the rule that WHERE THE FEDERAL LAW PURPORTS TO EXPRESS A COMPLETE SET OF RULES WITH RESPECT TO ANY SET OR CLASS OF POWERS OF NATIONAL BANKS, THE STATES HAVE NO JURISDICTION TO INTERFERE BY STATE LEGISLATION.

In the case of *Farmers' etc. National Bank v. Dearing*, 91 U. S. 29, 32 (1875), the question presented was whether the discount of a note by a national bank organized under the National Banking Act at a greater rate of interest than allowed by the statute of the state where such bank was located, rendered it liable to the penalty for usury provided by the state statute.

This Court held that the state had no power to impose any penalty, as the only penalty that could be imposed was that provided in the Federal laws. The Court said, with respect to the Federal statutes regarding the amount of interest that a national bank might charge, that:

"These clauses, examined by their own light, seem to us too clear to admit of doubt as to any thing to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject."

(6) A similar question again arose in the case of *Barnet v. National Bank*, 98 U. S. 555 (1878). In that case a suit was brought by a national bank against all the

parties to a bill of exchange discounted by it, to recover the amount thereof. The acceptor had made an assignment for the benefit of his creditors. It was held that his assignees could not set up, by way of counterclaim or setoff, that the bank, in discounting a series of bills of their assignor, the proceeds of which it used to pay other bills, knowingly took and was paid at a greater rate of interest than was allowed by law. This Court held that the National Banking Act having prescribed that, as a penalty for such taking, the person paying such unlawful interest, or his legal representative, may, in any action of debt against the bank, recover back twice the amount so paid, he can resort to no other mode or form of procedure.

This Court held that the provisions of the Federal law with respect to interest were exclusive of the state statutes.

(7) A recent case decided by the United States District Court for the Western District of Missouri clearly limits the power of the state on the facts therein appearing. That is the case of *Fidelity National Bank & Trust Company of Kansas City v. Enright*, 264 Fed. Rep. 236, 239 (1920). In that case the complainant, under the name of the Fidelity Trust Company, was formerly a trust company organized under the laws of the State of Missouri as such. Later it reorganized as a national banking corporation, clothed by the Federal Reserve Board with the right to act as trustee, executor, etc., or in any other capacity in which state banks, trust companies or other corporations which come into competition with national banks are permitted to act under the laws of the State of Missouri. In such capacity it took the name of "Fidelity

National Bank & Trust Company of Kansas City, Missouri," which name was duly approved by the Comptroller of the Currency, as provided by law. The state Banking Commissioner of Missouri took the position that in the discharge of its functions as a trust company under the law named, the complainant was acting in violation of the law of the state of Missouri, which provided that no corporation unless organized under the laws of the state of Missouri should use the words "Trust" or "Trust Company" as part of its name.

The Court held that the use of the name was proper, and said:

"When the government of the United States enters any field over which Congress is given express, or necessarily implied, jurisdiction, it appropriates that field to the fullest extent necessary to insure the complete and effective exercise of its sovereignty. The name of a national bank must be approved by the Comptroller of the Currency. It can be changed, or its use interfered with, by no other authority. We have here, then, a national bank, empowered by the laws of the United States to act in a fiduciary capacity, and bearing a name confirmed by national authority. Clearly, any act on the part of the state which impairs, hampers, embarrasses, restricts, or, in effect, wholly prevents, the discharge of its functions as a national banking institution with the incidental powers enumerated, must be void, because in express conflict with the paramount laws of the United States."

(8) In *Van Reed v. People's National Bank of Lebanon*, 198 U. S. 554 (1904), this Court construed section 5242 of the Revised Statutes of the United States, which provides that no "attachment, injunction or execution shall be issued against" a national bank or its property "before

final judgment in any suit, action, or proceeding, in any state, county, or municipal court." This Court held that that statute ousted the jurisdiction of state courts to attach property of national banks, any state law to the contrary notwithstanding.

Statutes which have been held to be valid

In order to show the subjects as to which state statutes have been held to be applicable to national banks, we refer to the following cases in which state statutes have been held to be valid:

(1) In the case of *McClellan v. Chipman*, 164 U. S. 347, 356-357 (1896), referred to in the opinion of the Missouri Supreme Court, in the case at bar (Record, printed page 13), this Court considered the provisions of sections 96 and 98 Chapter 157 of the Public Statutes of Massachusetts. Those statutes invalidated preferences made by insolvent debtors and assignments or transfers made in contemplation of insolvency. It was held that they did not conflict with the provisions contained in sections 5136 and 5137 of the Revised Statutes of the United States relating to national banks and to mortgages of real estate made to them in good faith by way of security for debts previously contracted, and that such statutes were valid when applied to claims of such banks against insolvent debtors.

This Court quoted *National Bank v. Commonwealth*, 9 Wallace 362, to the effect that national banks "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and

construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. *It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.*" (italics ours)

The Court reconciled that case with the case of *Davis v. Elmira Savings Bank* (*supra*), and said:

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

It will thus be seen that that case decided that the state laws are invalid whenever they (a) expressly conflict with the laws of the United States, or (b) frustrate the purpose for which the national banks were created, or (c) impair their efficiency to discharge the duties imposed upon them by the law of the United States.

(2) In *Guthrie v. Harkness*, 199 U. S. 148 (1905), a stockholder of a national bank applied for leave to inspect the books, accounts and loans of the bank, which was refused him. In a suit in a Utah court, the court enforced a state statute providing penalties for refusal of an inspection of corporate books. That decision was affirmed in this Court.

The Court discussed section 5241 of the Revised Statutes with respect to visitorial powers, and held that the stockholder was asserting a right which was not forbidden by the Federal Statutes.

Among other statutes that have been held valid as applicable to national banks, have been statutes providing that where cotton has been sold under a cash contract, the title shall not pass to the buyer until the price has been paid (*Augusta National Bank v. Augusta Cotton, etc. Company*, 104 Georgia 403); prohibiting recovery on a note given for the purchase price of goods sold in violation of a state statute (*Hanover National Bank v. Johnson*, 90 Alabama 549); giving to stockholders reasonable access to an inspection and examination of the books of the bank (*Winter v. Baldwin*, 89 Alabama 483); requiring the cashiers of national banks to file lists of stockholders, etc. with county clerks (*Waite v. Dowley*, 94 U. S. 527); providing for the levy on and sale under execution of bank stock (*Braden's Estate*, 165 Pennsylvania 184); providing for the issuance of a certificate of stock in the place of one lost by the holder, on application to the Supreme Court of the State (*Matter of Hayt*, 39 Misc. 356); allowing a national bank which has been reorganized as a state bank to prosecute or defend a claim in its old corporate name (*Thomas v. Farmers' Bank*, 46 Md. 53); placing notes payable and negotiable at banks organized in the state under the state or Federal laws, and endorsed to, or discounted by, any such bank on the same footing as foreign bills of exchange (*Merchants' National Bank v. Ford*, 124 Kentucky 403); providing that no person, corporation or association, except savings banks incorporated in the state, shall make use of words indicating that a place of business is the office of a savings bank, nor make use of any printed or written matter having words indicating that a business is the business of a savings bank, nor receive deposits and transact business in the

manner of a savings bank (*State v. People's National Bank*, 75 New Hampshire 27, But see *Fidelity National Bank & Trust Company of Kansas City v. Enright*, 264 Fed. Rep. 236 above discussed which is contrary. An attachment law enabling a bank within the state to discount with safety paper which a bank without the state could not discount without risk (*Hawley v. Hurd*, 72 Vermont 122).

The rule deducible from the foregoing cases with respect to the exclusive Federal control over national banks has been well summed up in a note in 21 *Harvard Law Review* 136 as follows:

"EXCLUSIVE FEDERAL CONTROL OVER NATIONAL BANKS.—It was early settled that Congress had the power to create national banks, as instruments 'necessary and proper' for carrying on the fiscal operations of government. (*McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.) And to enable these banks to exercise their national functions of providing a currency and of creating a market for government loans, the grant of ordinary banking powers is justified. (*Osborn v. Bank*, 9 Wheat. (U. S.) 738). Furthermore, to assure the efficiency of these federal agencies, it is necessary that both in the exercise of their national functions and in their ordinary banking business they should be protected from any state interference which might impair or destroy their usefulness. It is accordingly settled that a state cannot tax a national bank unless the federal government give special permission. (*McCulloch v. Maryland*, *supra*; *People v. Bank*, 123 Cal. 53). It seems obvious that any interference with the purely national functions of the bank is unconstitutional. The ordinary business, on the other hand, is done under the general state laws unless some special act of Congress covers the matter (*McClellan v. Chipman*, 164 U. S. 347). Thus, a national bank ordinarily takes title to property subject to the qualifications imposed by the state

law. (*Bank v. Augusta, etc. Co.*, 104 Ga. 403). Similarly, a state law, which exempts from trustee process negotiable paper transferred before due to a bank within the state, is valid although it works to the discrimination and disadvantage of a national bank without the state. (*Hawley v. Hurd, etc., Co.*, 72 Vt. 122). In this class of cases the state law interferes with the bank, but as it touches only the general business and does not conflict with any express law, it is upheld. But Congress, having the right to grant general banking powers, can regulate the exercise of those powers and protect the banks in that business. Unless the law be unconstitutional because not a reasonable exercise of the power to regulate or protect, or because contrary to some constitutional provision such as the Fourteenth Amendment, it will supersede the state law which formerly controlled. *The national laws may supersede all state laws on the subject, or they may be merely supplemental and overrule only the laws in direct conflict.* An example of the latter class is the case where the federal law mentions certain crimes of bank officers. For these crimes the officers can only be punished by the national government, but that does not prevent the state from punishing for other crimes committed by bank officers contrary to state laws. (*State v. Tuller*, 34 Conn. 280). *But if, on the other hand, the national government undertakes to make a system of rules and regulations covering an entire subject, such as the insolvency of a national bank, all state laws on the subject, EVEN IF NOT IN DIRECT CONFLICT WITH THE FEDERAL LAW, are annulled.* (*Easton v. Iowa*, 188 U. S. 220. See 17 Harv. L. Rev. 133). Similarly, the National Banking Act, which provides what interest the banks can charge and the results and penalties of taking usury, has been construed as *sweeping away all state usury laws as far as they affect national banks.* (*Farmers', etc. Bank v. Dearing*, 91 U. S. 29.)

"A recent New York case shows that far-reaching effect of this doctrine. The proposition is upheld that a note between A and B, which by state

law is absolutely void for usury, is enforceable when discounted by a national bank. *Schlesinger v. Gilhooly*, 189 N. Y. 1. (See 20 Harv. L. Rev. 581). Thus, through the power to say that a defense given by the state shall not be good against a national bank, the whole law of the state as to usury is rendered ineffective, for a note otherwise void can be made enforceable, as to the principal at least, by a sale to a national bank. The result is astounding, but seems a logical consequence of the power of Congress to pass exclusive laws as to the business dealings of national banks."

We contend that in the case at bar the national government has undertaken "to make a system of rules and regulations covering an entire subject", that subject being the place of business of a national bank. Those rules are contained in Revised Statutes Sections 5134, 5136 and 5190.

By those statutes Congress undertook to provide the rules for the *place* (that is the city, town, village or county) where a federal bank should exercise its powers and the *location* within such place where those powers should be exercised.

Congress having legislated on that subject, no other or further legislation by states is permissible or valid with respect to national banks.

The court below in the case at bar undertook to lay down the rule that a state has power to prohibit any act by a national bank which a state court may find to be *ultra vires* of a national bank. We contend that that rule is erroneous. We contend that the true rule is that where Congress has undertaken to lay down rules and regulations for the conduct of a national bank "covering an entire subject", a state has no jurisdiction to legislate on that subject at all and it is not competent for a state

court to undertake to inquire whether the activities of a national bank within the class covered by that subject are or are not *ultra vires*.

We contend that we are supported by the authorities above cited that Congress having undertaken to lay down a complete set of rules and regulations with respect to the location of the place or places of business of a national bank, a state has no jurisdiction on the subject whatever.

It follows that the provisions of section 11737 of the laws of the State of Missouri are inapplicable to national banks and are, in as far as they purport to be a limitation upon the activities of a national bank, utterly null and void.

The Supreme Court of Missouri in the case at bar relied upon and cited at considerable length (Record, printed pages 13 and 14) the decision of the Supreme Court of Kentucky in the case of *First National Bank v. Commonwealth*, 143 Kentucky 816. In fact, it may be said that the opinion of the Supreme Court of Missouri in the case at bar rests solely upon the authority of the decision of the Supreme Court of Kentucky in the case of *First National Bank v. Commonwealth*. In that case it was held that real estate held by a national bank after the expiration of the five-year period allowed for national banks to hold real estate lawfully acquired by them, was held by the national bank *ultra vires* and was subject to the laws of escheat of the state of Kentucky and did accordingly escheat to the state of Kentucky. Our contention is that the decision of the Supreme Court of Kentucky in that case is contrary to the laws of the United States and to the decisions of this Court.

Congress, in Section 5137 of the United States Revised Statutes, dealt with the entire subject of the holding of real estate by national banks and dealt with it completely. Section 5137 provides that a national banking association may purchase, hold and convey real estate for the "following purposes and for no others." It then goes on to define that it may hold such real estate:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it."

Section 5137 then contains the following provision:

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

Congress therefore dealt with the subject of what real estate could be held by national banks and how long it might be held. Congress legislated upon the subject, and having legislated its will is supreme and cannot be interfered with by any state law. It has been held over and over again that in case of the violation of those provisions of the Federal act respecting real estate, the Federal Government only may take advantage of those violations or object to them.

It appears from a reading of the Kentucky case that the Comptroller in that particular case had approved the holding by the national bank of the real estate beyond the five-year period specified in Section 5137. Yet in spite of that the Kentucky court held that it escheated to the state. We respectfully contend that that decision of the Supreme Court is directly contrary to the decisions of this Court holding that where the Federal Government has undertaken "to make a system of rules and regulations covering the entire subject" a state has no jurisdiction whatever to legislate upon that subject.

The following are a few of the cases for the rule that where the National Banking Act prohibits certain acts without imposing any penalty or forfeiture the validity of executed transactions can be questioned only by the United States.

Thompson v. St. Nicholas National Bank, 146 U. S. 240 (1892), involved a wrongful certification of checks by the defendant bank. This Court said, at page 251:

"Moreover, it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *National Bank of Xenia v. Stewart*, 107 U. S. 676."

Reynolds v. Crawfordsville First National Bank, 112 U. S. 405 (1884). This was a bill by the bank to quiet title to land. To the objection that the holding of the land by the bank was *ultra vires*, this Court said, on page 413:

"But if there was any force in this objection to the title, it could not be raised by the debtor, for where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

Fortier v. New Orleans Bank, 112 U. S. 439 (1884). This was an action for the foreclosure of a mortgage. On page 451 this Court said:

"Complaint is made in behalf of Mr. Fortier that the court erred in enforcing by its decree a loan of money made by a national bank on the security of a mortgage; the contention being that the loan on such a security was unauthorized by the national banking act, and was therefore void. In the case of *National Bank v. Matthews*, 98 U. S. 621, and *National Bank v. Whitney*, 103 U. S. 99, this point is expressly decided against the contention of the defendant, and in the latter case it was also held that an objection to the taking by the bank of a mortgage lien as security for future advances could only be made by the United States."

National Bank v. Whitney, 103 U. S. 99 (1880). This case presented the validity of the holding of a mortgage upon real estate by the bank. The Court referred to the case of *National Bank v. Matthews*, 98 U. S. 621, and said on page 102:

"The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the bank, so far as the subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of statute, the objection can only be urged by the government. *Fleckner v. United States Bank*, 8 Wheat. 338-355."

National Bank v. Matthews, 98 U. S. 621 (1878). This case involved the validity of the holding by a national bank of a deed of trust to secure a loan on real estate. This Court said on page 628:

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

The Court said also on page 629:

"The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application."

The only other case relied on by the court below to sustain the validity of the state act is that of this Court in the case of *McClellan v. Chipman* (*supra*). It is a sufficient answer to the citation of that case to state that the acts done by the national bank in that case were part of the ordinary business of the bank and Congress had passed no special legislation on the subject.

POINT II

THE ACT OF THE PLAINTIFF IN ERROR IN ESTABLISHING A BRANCH OFFICE IN THE PLACE DESIGNATED IN ITS CERTIFICATE OF ORGANIZATION WAS EITHER EXPRESSLY OR IMPLIEDLY AUTHORIZED BY THE FEDERAL STATUTES.

The act of the plaintiff in error complained of by the Attorney General of the State of Missouri was the establishment of a branch office or agency "in a separate building located several blocks from the banking house before mentioned" in which the plaintiff in error "is engaged in the business of banking, discounting bills, notes and other evidences of debt, receiving deposits and paying out the same upon check, buying and selling bills of exchange and lending money" (Record, printed page 1).

The judgment restrained the plaintiff in error from conducting said branch and held that it had "usurped and is usurping authority, powers and privileges denied it by the laws of the United States and of this State" (Record, printed page 7).

The Supreme Court of Missouri therefore ordered and adjudged that the respondent "be ousted from the privilege of operating" said branch, or any other branch, and from conducting "a banking business thereat" (Record, printed page 8).

The two sections of the Revised Statutes of the United States which are involved here are Section 5134 and Section 5190.

The pertinent provisions of Section 5134 are as follows:

"Sec. 5134.—The persons uniting to form such an association shall, under their hands, make an

organization certificate, which shall specifically state: * * *

"Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town or village."

Section 5190 of the Revised Statutes provides as follows:

"Sec. 5190.—The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."

The question that arises here is whether the power of a national bank to establish a branch office in the place named in its certificate of organization is either an express or an implied power under the foregoing sections of the Revised Statutes. An implied power of a corporation is one that is (1) not expressly granted, but (2) not prohibited, and (3) one that is "needful, suitable and proper to accomplish the object of the grant and one that is directly and immediately appropriate to the execution of these specific powers". *People v. Pullman Palace Car Co.*, 175 Illinois 125, 136.

(1) It is by no means conceded, as was argued by the Supreme Court below, that there is no express grant of power to establish a branch office.

The word "an" in the phrase "at an office or banking house located in the place specified in its organization certificate" in Section 5190 is not necessarily a singular term.

"The indefinite article 'a', while properly placed before a singular noun and having the meaning 'one,' is not necessarily a singular term, and is often used in the sense of 'any,' and is then applied

to more than one individual object." 1 *Corpus Juris*, page 1.

In *Thompson v. Wesleyan Newspaper Association*, 8 C. B. 849, a deed of settlement of an English company registered under the English statute provided that it should not be lawful for the directors to contract any debts in conducting the affairs of the company beyond one hundred pounds at any one time, except in the case of the purchase money for a newspaper, of which the board of directors might leave unpaid any part not exceeding one thousand pounds and might issue "*a promissory note*" or accept "*a bill of exchange*" on behalf of the company for such balance. It was held that the substance of the authority was that the directors might contract a debt to the amount of one thousand pounds and secure it by a negotiable instrument, and that the directors having contracted a debt to that amount were not precluded from giving security for it with its legal accretions by *several* notes or bills instead of a *single* note or bill.

Other cases cited in support of the proposition that the indefinite article is not accessarily a singular term, are: *Lowe v. Brooks*, 23 Georgia 325, 328. *Thompson v. Stewart*, 60 Iowa 223, 225. *Commonwealth v. Watts*, 84 Kentucky 537, 541. *National Union Bank v. Copeland*, 141 Mass. 257. *Snowden v. Guion*, 101 N. Y. 458, 463. *Dobson v. Litton*, 5 Coldw. (Tenn.) 616, 619. 28 L. R. A. 153.

In *Snowden v. Guion*, 101 N. Y. 458, 463 (1886) the United States Lloyds issued an open policy of marine insurance which became operative only by special endorsement, describing the particular risk assumed. As the policy was originally issued, the underwriters were liable for loss of "animals caused directly by stranding, sinking,

burning or collision". That was subsequently modified by inserting after the words "directly by" the words "a sea", so that the policy covered loss of animals "caused directly by a sea stranding, sinking, burning or collision".

A shipment of live cattle was made under that policy. The steamer carrying the cattle encountered a severe storm. The waves caused it to "roll tremendously". The cattle were thrown down violently and most of them were killed.

In an action upon the policy it was argued on behalf of the company that the words in the policy "a sea" were meant to cover the effect of one or more waves upon the motion of the vessel. The Court of Appeals admitted that the phrase was ambiguous. But that court held that the loss was caused directly by "a sea" within the meaning of the policy and that the insurers were liable. The risk contemplated was some effect of "a sea" upon a vessel. The approximate result of such "a sea" would be a loss to the property insured. That was not limited to the effect produced by *one or more specific and particular waves*, as distinguished from the general storm and commotion of the water in such storm. The Court of Appeals held that the policy did not "refer to some particular wave or surge, separate from its fellows, which worked its own peculiar and special destruction". The policy covered the effect of "seas" and was not limited to a single "sea".

In the case of *National Union Bank v. Copeland*, 141 Mass. 257, a debtor made an assignment in writing to trustees for the benefit of such creditors as should execute the instrument of assignment within sixty days from the date thereof, or within such further time as the trustees should

allow "in and by *a writing*" endorsed on the instrument of assignment. It was held that the term "*a writing*" did not limit the trustees to only one extension of the time in which creditors could become parties to the extension.

The case of *State v. Martin*, 60 Ark. 353, construed a provision of the Constitution of Arkansas which provided that for each circuit "a judge shall be elected". The Arkansas legislature passed an act providing for an *additional judge* for the Sixth Circuit. It was held that the meaning of the Constitution was that there should be "AT LEAST ONE JUDGE" for each circuit, and that there was no limitation upon the legislature to provide for more "if the necessity arises". The court held that the word "a" is "in no sense a word of limitation".

In a note to *State v. Martin*, in 28 *Lawyers' Reports Annotated* 153, it is stated:

"The constitutional construction made by the above case is so fully discussed therein as to need nothing further. The contention that the article "a" should be construed as equivalent to "one" raises a novel question of much practical importance in constitutional law, but which, in the light of the above opinion, can hardly be considered doubtful".

In the opinion of the court below (Record, printed page 9) it was stated that "no express power to establish a branch bank appears in either of these statutes." If the principle enunciated in *State v. Martin* be followed, that the word "a" means *at least one*, then there was an express power to establish one office and as many more as might be necessary.

It is therefore by no means clear that there is not an express grant of power under Section 5190 to national

banks to transact their business at "any office" or "any banking house" located in the place "specified in its organization certificate".

If, however, it should be held that there is no such express grant of power, then the question arises

(2) Whether there is any prohibition in the Federal statutes of a national bank maintaining more than one office or banking house, that is whether the use of the words "an office or banking house" limits a national bank to the use of *one* office or *one* banking house in the place specified in its organization certificate. In its opinion the Supreme Court of Missouri states that "the unmistakable character of the words employed and the purpose to be accomplished did not in our opinion authorize such an interpretation of the section as to enable its terms to be read in the plural as well as the singular number." (Record, printed page 10).

Again the Court below said:

"This location having been established, it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words 'an office or banking house' cease to be specific, and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. Such a construction finds no resting place in reason." (Record, pages 9 and 10).

We have shown above that the word "an" as used in Section 5190 is not necessarily a singular term. If, however, this Court should hold that it is a singular term, then the statement of the Supreme Court of Missouri last quoted flies in the face of a principle of statutory

construction long recognized at the common law and now established in the statutory construction laws not only of the United States but of many of the several States.

The rule has been stated as follows:

"When necessary to give effect to the legislative intent, words in the plural number will be construed to include the singular, and words importing the singular only will be applied to the plural of persons and things." 36 *Cyc* 1123.

The following cases are cited in support of that proposition: *Hogan v. State*, 36 Wisconsin 226, 247. *Missouri v. Kansas City, etc. Railway Co.*, 32 Fed. Rep. 722. *People v. Aurora*, 84 Illinois 157. *Ellis v. Whitlock*, 10 Missouri 781. *State v. Levin*, 108 Atlantic Reporter 10, 13 (New Jersey). *In re Op*, 117 Atlantic Reporter 97 (Rhode Island).

That very rule has been incorporated in the Revised Statutes of the United States (Section one R. S.) as follows:

"In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February 25, 1871, words importing the singular number may extend and be applied to several persons or things; * * *"

Thus the Supreme Court of Missouri, in stating that the construction for which we contend "finds no resting place in reason", makes that statement in the face of a statute of the United States which officially permits an interpretation contrary to that which the Missouri court placed upon the statute.

It is true that the rule at the common law and the United States statute with respect to interpreting words in the singular number does not make it mandatory that such

words shall be construed in the plural number. They do, however, allow such a construction "when necessary to give effect to the legislative intent."

As this Court stated in *United States v. Oregon, etc. Railroad*, 164 U. S. 526, 541 (1896) :

"The general rule is that 'words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular', as provided in the first section of the Revised Statutes."

In *Hogan v. State* (*supra*) the statute provided that an act, in order to constitute murder in the second degree, must be imminently dangerous to "others". It was held that the word did not imply that the act must be dangerous to several persons but "to other or others * * * than the persons committing it".

That Section 5190 of the Revised Statutes is not to be construed as containing a strict limitation to a single office or a single banking house, but is to be construed reasonably, is shown in the case of *Merchants National Bank v. State National Bank*, 10 Wallace 604, 650 (1870). In that case the cashier of the State National Bank certified checks drawn on the State National Bank and delivered the checks to the Merchants National Bank in payment of gold certificates. Those checks were certified by the cashier of the State National Bank not at his own bank but at the banking office of the Merchants National Bank. The action was brought against the State National Bank upon its certification. The State National Bank defended on the ground, among others, that the cashier had not certified the checks at its banking house and that the act of the cashier in certifying the checks was therefore *ultra vires*.

It was held by this Court that the State National Bank was liable upon the certification of its cashier, wherever made.

At the end of a long opinion which had chiefly to do with the powers of the cashier of the bank, this Court said:

"It is objected that the checks were not certified by the cashier at his banking house. *The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably.* The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection." Citing *Bank of Augusta v. Earle*, 13 Peters 519; *Pendleton v. Bank of Kentucky*, 1 T. B. Munroe 182.

When Congress provided in Revised Statutes, Section 5190, that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate", the legislative intention was probably no other than evinced in legislative requirements providing for the location of the principal offices of corporations generally.

In *Jossey v. Georgia and Alabama Railway Company*, 102 Georgia 706, the charter of the corporation provided that: "The principal office and headquarters of said railroad company for the transaction of the business of the company appertaining to its management shall be in the city of Americus, Sumter county, Georgia."

For the management of its railway business the directors of the corporation had organized various departments, consisting of a department for the management of its traffic, a department for auditing its accounts, and others of like character organized for special purposes connected with the administration of its railway business. It projected the removal of these various offices to a point other than the city of Americus, and the establishment of branch offices of like character at other points for the more convenient transaction of its business. To prevent this a petition in equity was filed by certain citizens of the city of Americus and stockholders of the company to enjoin the contemplated removal of these respective offices, alleging that the principal office of the corporation was fixed by its charter in the city of Americus, and having been so fixed, a change of the corporate situs could not be accomplished directly or indirectly by the action of the directors, without procuring an amendment of the charter authorizing such a step. The defendant answered, denying its purpose to remove the principal office of the corporation from the point designated in the charter, but admitting a purpose to establish at the city of Savannah a branch office in connection with its traffic and auditing departments.

The injunction was refused, and on appeal the decision of the lower court was affirmed. The Appellate Court said:

"The business of a railroad corporation, because of its nature, must of necessity be conducted in places other than that fixed by its charter as the place of location of its principal office. While the latter place must be the point at which the corporation as a corporate entity resides, it is indispensable

to its business that it shall be enabled elsewhere to establish offices of a purely administrative character; and a distinction must be taken between the principal office of a corporation proper, and those administrative offices which may from time to time be created by the corporation for the more convenient transaction of the business for the conduct of which it was created. It must have a place at which it may be sued, at which its corporate functions may be performed; but this does not negative the right to establish other places for the transaction of the industrial business of the corporation. As will be seen by the extract from the charter which we have quoted, the principal office and headquarters of the railway company for the transaction of the business of the company appertaining to its management, that is to the management of the corporation itself, was required to be located in the city of Americus. To that extent the charter speaks in no uncertain terms; and touching the business which is to be transacted in the management of the affairs of the company, no other place can be substituted for that provided by the positive statement of the charter. Are the offices intended to be removed corporate offices in the proper sense? The office of the president of the company, and the offices of that class of officers who stand for and represent the corporate entity, must be there located. The books of the company showing the subscription to its stock must be there kept for the information of its stockholders and shareholders. There must be transacted the corporate business proper, there its profits must come home to it to be distributed among its stockholders, and there must be kept the offices of those persons who are engaged in the management of the corporate affairs. There also its corporate meetings must be held. As we have seen, this constitutes the principal office of the corporation; but as to mere administrative offices, there is no requirement of the charter that they shall be located at any particular point. It is indispensable to the successful operation of the business for which the corporation was created, that the creation, man-

agement and control of these administrative offices must rest within the discretion of the directory; and hence when the corporation fixes its principal office at a particular point, the words 'principal office' must be held to include only such offices as are created by the charter, or by the directory in pursuance of the charter, for the administration of the corporate affairs proper."

While the foregoing case related to a railway company organized under the laws of Georgia, it is reasonable to assume that it was the intent of Congress in enacting Section 5190 of the Revised Statutes to provide with respect to national banks for a principal office analagous to the principal office of state corporations. All of the reasons stated in the opinion of the Georgia court for the establishment of branch administrative offices apply with equal force to national banks, as will be hereinafter shown.

A construction which would place national banks at a disadvantage in competition with state banks should be avoided. If the changed conditions of the banking business are indisputably such that a strict construction of the Statute, according to the letter of Section 5190, would work to the disadvantage of national banks and in favor of state banks, it would seem to be the duty of the court to construe Section 5190 so as not to place national banks at a disadvantage in competition with state banks.

The language of Judge Sanborn in the case of *Harper v. Victor*, 212 Fed. Rep. 903, 907 (1914), should be applied here. The court said in that case:

"The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage".

To the same effect is the rule of statutory interpretation announced by this Court in *Lau Ow Bew v. United States*, 144 United States 47, 59 (1892). The Court said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

The following cases are to the same effect: *United States v. Corbett*, 215 United States 233. *United States v. Oregon R. R. Co.*, 164 United States 526, 539. *Church of the Holy Trinity v. U. S.*, 143 U. S. 457. *Henderson v. Mayor of New York*, 92 U. S. 259. *Oates v. National Bank*, 100 U. S. 239.

In the case of *Holy Trinity Church v. United States*, 143 U. S. 457, 459, 1891, wherein a strict construction of the act of February 26, 1885, relative to alien contract laborers would have barred the Rector of Trinity Church in New York from coming to the United States as minister of that church, this Court said:

"It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The right to establish more than one office or banking house within the "place" depends upon the construction

to be put upon Section 5190. The word "an" in that section is of doubtful meaning. In such case "rules of statutory construction are to be invoked as aids to the ascertaining of the meaning or application of the words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity". *Russell Motor Car Co. v. United States*, decided April 9, 1923, No. 485.

Turning to the contentions of the respective sides in the case at bar on the one hand, it is contended that Congress by the words "an office or banking house" intended to limit the bank to the establishment of one office or one banking house. On the other hand, it is contended that the indefinite article "an" does not limit the number of offices to one but that it points out "one of a class containing more of the same kind."

In support of the last contention we submit that the word "an" is not used as a word of limitation. The intent of the Act is to require that the usual business of the bank shall be transacted at a fixed office or banking house located in the "place" specified in its charter, as distinguished from some place other than an office or banking house. It is the intent to be gathered from the Act that the usual business of each national bank shall be transacted in some recognized and fixed office or banking house and shall not be ambulatory—that it shall not be a nomadic bank. This prohibition against a business office of the bank being moved from place to place should not, in reason, be held to limit the bank's entire transactions in one office or agency, so long as the identity and responsibility of the recognized main office or banking house is preserved.

It would be not only discriminatory against national banks but would be an absurd and illogical conclusion to so limit the rights of national banks to one office or banking house. It would ascribe to Congress an idea of public policy, which would allow additional offices to state banks when they became nationalized under Section 5155 of the Revised Statutes and would refuse additional offices to national banks, primarily organized as such, when expansion of business or movement of commercial and industrial centers shifted according to the development of the city. It is unreasonable to impute to Congress an intention to allow branches in the one case and to refuse it in the other.

A reasonable interpretation of Section 5190 would seem to be that a national bank has the right to do a general banking business anywhere within the city of its location; that it has the right to establish its offices anywhere within the city; that it may establish as many offices or agencies within the city as are needful, suitable, proper or such as are required to meet the legitimate demands of the usual business of modern banking.

(3) The authorities showing what powers are "needful, suitable and proper" to accomplish an object of a corporation or are "directly and immediately appropriate to the execution of specific powers" are cited in the brief of counsel for the plaintiff-in-error and need not be repeated here. But we wish to emphasize, however, the undoubted rule that whether or not a power is implied or incidental to express powers is to be determined from a consideration of all the facts and circumstances surrounding the business of a bank at the time the power is sought to be exercised.

One circumstance which must be considered and which we contend is controlling, is the fact that both state and national banks have found it necessary under modern conditions, and especially in large cities, to establish branch offices for the successful conduct of their business.

To show the extent of branch banking in the United States it is but necessary to state that the following twenty-one States permit branch banking under the laws of those States, as does also the District of Columbia:

Arizona, Arkansas, California, Delaware, Georgia, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Wyoming.

The extent to which national banks in recent years have been brought into competition with state banks and branches of state banks in many of the large cities of the United States is shown by the following compilation made in the office of the Comptroller of the Currency:

In Detroit, Michigan, there are three national banks and one branch office. The three national banks are in close proximity to each other in the downtown business section. In competition with those three national banks are fourteen State banks which have 189 state bank branches. To this number should be added eleven state banks in suburbs of Detroit. Those eleven state banks in the suburbs have ten branches.

In the District of Columbia fourteen national banks have seven branch offices. Thirty-six non-national banks have eight branch offices.

In Cincinnati there are twenty-two national banks with no branches. There are thirty-eight state banks with thirty branches.

In Columbus there are seven national banks with no branches. There are seven state banks one of which has seven branches.

In Cleveland there are three national banks with two national bank branch offices. There are eighteen state banks with a total of seventy-five state bank branches.

In New Orleans there is one national bank with no branch office. There are six state banks with thirty-eight branch offices.

In Atlanta there are three national banks with six branches. There are thirteen state banks, one of which has four branches.

In Nashville there are five national banks with no branches. There are nine state banks with seven branches.

In Richmond there are six national banks, one of which has four branch offices. There are twenty-three state banks with eight branches.

In Baltimore there are twelve national banks, one of which has two branch offices. There are forty-six state banks with twenty-one branches.

In Buffalo there are four national banks one of which has a branch office. There are twelve state banks with forty branches.

In Oakland, California, there are three national banks with no branch offices. There are seven state banks with thirty state bank branches.

In Boston there are thirteen national banks with one branch office. There are twenty state banks with twenty-three branches.

In San Francisco there are seven national banks with no branch offices. There are eighteen state banks with forty-three state bank branches.

In Los Angeles there are twenty-four national banks and six national bank branch offices. There are twenty-five state banks with one hundred and eight state bank branches.

In the City of New York there are thirty-two national banks with forty-three branches. There are nineteen state banks with one hundred and thirty-nine branches. There are twenty trust companies with sixty branches. It will thus be seen that as against the forty-three branches of national banks there are one hundred and ninety-nine branches of state banks and trust companies in competition therewith.

A power to establish branch offices that is so widely used both by state and national banks in so many of the cities of the United States is almost beyond argument a power which is "needful, suitable and proper" to accomplish the object of a bank and is "directly and immediately appropriate to the execution of specific powers" possessed by those banks.

Conditions in modern banking have changed radically, particularly in large cities, since 1864. In the early days of corporate organization in this country, corporations would have their principal office only in one place and do business only at the principal office. But the demands of business have required corporations to establish branches.

The same is true of banks. A bank has its principal office in a city or town and should have as many branches in that city or town as the needs of its customers require and as may be approved by the Comptroller of the Currency.

The above statistics are typical of the competition that national banks must meet in the conduct of their business at the hands of state banks. It would seem to follow that under the provisions of Section 5136 of the Revised Statutes of the United States, which provide that a national bank shall have power "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking", national banks should have as such incidental power the right to conduct business in more than one office, if such branches are reasonably necessary for the proper conduct of its business.

POINT III

THE CONTINUED INTERPRETATION OF THE STATUTE BY THE COMPTROLLER OF THE CURRENCY WHO IS CHARGED WITH ITS EXECUTION IS IN FAVOR OF THE EXERCISE OF THE POWER CONTENDED FOR BY THE PLAINTIFF IN ERROR.

In the opinion herein of the Supreme Court of Missouri (Record, printed pages 12 and 13), it is stated with respect to the National Bank Act that:

"In addition, it is a well-established rule of construction that a long continued interpretation of a statute by public officers charged with its execution, while not controlling upon the courts, is entitled to special consideration (*McAllister v. Cupples Station*, 283 Mo. 115; *State ex rel. Chick v. Davis*, 273 Mo. 660; *State ex rel. Kin. Tel. Co. v. Roach*, 269 Mo. 437; *Ewing v. Vernon Co.*, 216 Mo. 689).

"Apropos of the foregoing, it is shown that the Attorneys General of the United States have uniformly construed the National Bank Act as not authorizing the establishment of branch banks".

Up to 1911 there was no settled practice as to authorizing or refusing to authorize the establishment of branch banks. In that year, upon the application of a national

bank for leave to establish a branch office the question was referred to the Attorney General for an opinion. The Attorney General gave as his opinion that such branch office was not permissible under the National Bank Act.

Such is the "long continued interpretation of a statute by public officers charged with its execution" which the Supreme Court of Missouri stated is "entitled to special consideration".

The fact is that the "continued interpretation" of the statute has been quite the other way. As against a single opinion of the Attorney General rendered in 1911, we have the fact that while the Attorney General of the State of Missouri brought the quo warranto proceedings from which this plaintiff in error appeals to this Court, for the purpose of preventing the exercise by a national bank of its right to maintain a branch bank, no such action of a similar kind has ever been brought by the Attorney General of the United States or by any officer or official of the United States against a national bank. There was ample opportunity to do so. Notwithstanding said opinion of the Attorney General, branches of national banks have been created, now exist and are being from time to time established.

The extent to which the Comptroller of the Currency, as an arm of the Executive Department, has authorized, sanctioned and approved the establishment of branch offices of national banks in some of the large cities of the United States is shown by the enumeration of the branches of national banks in the various cities specified above in this brief.

The existence of these branch offices evidences a long continued interpretation of the statute by a public officer charged with its execution.

It may be stated that in some cases those branches are continuations of branches of state banks which became national banks under the provisions of Section 5155 of the Revised Statutes. That Section is as follows:

"It shall be lawful for any bank or banking association organized under State laws, *and having branches*, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association in conformity with existing laws, *and to retain and keep in operation its branches, or such one or more of them as it may elect to retain*; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each".

It is the undoubted fact that in some cases state banks having branches became national banks under the provisions of the foregoing section and then merged with another national bank. Upon that merger, however, the same question of the right and power of national banks to maintain branches arose. Indeed, the question arose upon such merger of the right to maintain what were originally the principal offices of the two merged banks. While Section 5155 of the Revised Statutes authorizes the continuation of branches of a state bank after it has become a national bank, there is nothing therein contained which gives express authorization for the further retention of those branches after the merger of the parent bank with another national bank. Strictly speaking, when such a national bank merged with another national bank it lost its corporate existence and all its assets went into the absorbing bank. That case is not in any sense covered by Section 5155 of the Revised Statutes. Therefore the right

to maintain such branches must be found, if at all, in Sections 5136 and 5190 of the Revised Statutes.

It is the acquiescence of the Attorneys General of the United States and of the Comptrollers of the Currency, in the existence of those branches in such large numbers since the year 1911 and in so many different cities and states that is a practical construction of the statute by departmental interpretation far outweighing any such interpretation expressed in the Attorney General's opinion of 1911.

It is a fair assumption from the conduct of the Department of Justice that the opinion of that department with respect to the powers of national banks has changed since 1911.

It is the settled rule of this court that the practical interpretation of an ambiguous or uncertain statute by an executive department charged with its administration is entitled to the highest respect, and if acted upon for a number of years, will not be disturbed, except for very cogent reasons. *Logan v. Davis*, 233 U. S. 613, 627. *Kern River Co. v. U. S.*, 257 U. S. 147, 154. *National Lead Co. v. U. S.*, 252 U. S. 140, 145.

In *Corsicana National Bank v. Johnson*, 251 U. S. 68, 82, (1919), it was held by this Court that contingent liabilities incurred by one person as surety or as an endorser for money borrowed by another are not "liabilities * * * for money borrowed" in the sense of Revised Statutes of the United States Section 5200. In arriving at this conclusion, this Court, by Mr. Justice Pitney, referred to the practical and administrative rules of the Comptroller of the Currency with respect to Section 5200 as a practical construction of the Statute. He said:

"As to whether in Section 5200 the words 'the total liabilities * * * of any person * * * for money borrowed,' etc., require the liability of a surety or of an indorser for money borrowed by another to be added to his direct liability for money borrowed by himself in ascertaining whether the limit is exceeded — whatever view we might entertain were the matter *res nova*—we are advised that by the practice and administrative rulings of the Comptroller of the Currency during a long period, if not from the beginning of national banking, liabilities which are incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not included in the computation. We feel constrained to accept this as a practical construction of the section".

The practical and administrative rulings of the Comptroller of the Currency respecting the establishment and approval of branch offices of national banks justifies the application of the foregoing rule to the construction of Section 5190 of the United States Revised Statutes. When so applied, it demonstrates that the Comptroller of the Currency has been and is now acting within the laws of the United States in the establishment and approval of branch offices of national banks.

POINT IV

RECENT LEGISLATION OF CONGRESS RECOGNIZES THE RIGHT OF THE COMPTROLLER OF THE CURRENCY TO AUTHORIZE THE ESTABLISHMENT OF BRANCH OFFICES OF NATIONAL BANKS.

In the opinion of the Missouri Supreme Court (Record, printed page 12) it is stated that:

"An unambiguous statute, such as the National Bank Act, does not require the adventitious aid of

subsequent kindred legislation to determine its meaning. Despite this fact where, as here, there is a general grant of power, however clear that grant may be, the enactment of subsequent legislation containing a specific kindred grant of power will afford at least persuasive support to the conclusion that the latter was not included within the former or the original grant. Such is the effect of the Act of Congress of March 3, 1865, now Section 5155, 3 U. S. Comp. Stats. p. 3467. This act provides that any bank or banking institution organized under a state law and having branches, may in conformity with existing law become a national bank and retain its branches. In the passage of this act it is evident that the legislative construction of the original is that it did not authorize the establishment of branch banks. Otherwise the subsequent section 5155 would not have been enacted. A recognition of the limitations of the National Bank Act is evident from the fact that the right of a national bank to have branches as provided in said section is limited to states the banking laws of which authorize the establishment of branches.

"The establishment by special acts of Congress of a branch bank at Chicago during the Columbia Exposition and at St. Louis during the Louisiana Purchase Exposition, affords further evidence of legislative construction of the National Bank Act, which excludes from its incidental powers the right to establish branch banks".

It is respectfully submitted that the Supreme Court of Missouri in laying down the above sweeping generalizations ignored a recent act of Congress which is controlling on the question of legislative intent and was misinformed as to the true purpose of the two acts regarding the Columbia Exposition and the St. Louis Exposition and misinterpreted the meaning of Section 5155 of the Revised Statutes of the United States.

We will take these points up in the order named.

The Act of Congress of April 26, 1922 (Public—No. 200—S. 3170—67th Congress—Part One—Stats. 1921-1922 p. 500, Chap. 147), is significant of a legislative recognition of the power of the Comptroller of the Currency to authorize, consent to and approve branch offices of National Banks and branch banks of District Banks in the District of Columbia. The statute reads as follows:

"An Act Regulating corporations doing a banking business in the District of Columbia. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no corporation that is not now engaged in the business of banking in the District of Columbia shall, after the passage of this Act, be permitted to enter upon said business in the said District, nor shall any corporation now or hereafter engaged in the business of banking be permitted to establish branch banks in said District, until after it shall have secured the approval and consent of the Comptroller of the Currency; and each one of the officers of such corporation so offending shall be punished by a fine not exceeding \$1,000 or imprisonment not exceeding one year, or by both fine and imprisonment, in the discretion of the court. (Approved, April 26, 1922)."

The expression in the Act "nor shall any corporation now or hereafter engaged in the business of banking be permitted to establish branch banks in said district, until after it shall have secured the approval and consent of the Comptroller of the Currency" plainly indicates that Congress recognized the power of national banks to establish branches. If the right of national banks to establish branch offices was not recognized by Congress when it enacted the statute, it would have been a simple matter to confine the requirement as to approval *to the district banks* and to

eliminate national banks from the provisions of the statute. Instead, there was enacted the statute applicable to both classes of banks. That implied the existence of the right of both classes of banks to have such branches as are usual in the conduct of the banking business.

The Act of April 26, 1922 was a prohibition. It recognized the power of national banks to establish branch banks in the district. It merely provided that national banks should not establish such branch banks until after they should have secured "the approval and consent of the Comptroller of the Currency". The Act in its terms as well as in its spirit did not give the power to national banks to establish branch banks. It was based upon the assumption of that power in national banks to establish branches. But it limited the exercise of that power to cases where banks should have secured "the approval and consent of the Comptroller of the Currency."

The statute is applicable to national banks within the district. National banks within the district as well as national banks in the several States of the Union are both subject to the National Banking Act. They are all subject to the control of the Comptroller of the Currency. It would seem to follow, therefore, that by the enactment of this statute there was an express recognition of the right theretofore existing of the national banks in the District and elsewhere within the United States to create branches subject to the control and with the approval of the Comptroller of the Currency.

When this recent legislation is considered for the purpose of ascertaining the legislative intent and meaning of Section 5190, the opinion of the Attorney General and the decision of the Supreme Court of Missouri, both of

which relied upon the effect of prior legislation, lose much of the force of their reasoning.

Both the Attorney General in the opinion referred to and the Supreme Court of Missouri cited and relied upon the provisions of Section 5155 of the Revised Statutes providing for branches of state banks which was enacted March 3, 1865. That section reads as follows:

"Section 5155. It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each".

This statute must have been in the legislative mind as well as Section 5190 at the time of the enactment of the Act of April 26, 1922. Therefore, by reason of the general provisions of the Act of April 26, 1922, both national and district banks were recognized as existing and having the right to establish branches with the consent and approval of the Comptroller of the Currency.

The Act of May 12, 1892 (27 Stat. 33) and the Act of March 3, 1901 (31 Stat. 1444) are also cited by the Supreme Court of Missouri in the case at bar as indicative of a contrary legislative intent, namely, that such special legislation was not necessary if Congress had not by the enactment of the same impliedly recognized the lack of power of national banks to create and maintain branch offices. The same argument is made in the opinion of the Attorney General of 1911 (29 Op. Atty. Gen. 81).

We think that the foregoing argument as to legislative intent based upon the Act of April 26, 1922, fully answers that argument.

We make a further distinction between the opinion of the Missouri Supreme Court and the opinion of Attorney General on the one hand and the correct meaning of the above legislation on the other hand. Those opinions were strongly influenced by the Act of Congress, Section 5155 of the Revised Statutes, heretofore quoted, which permits a state bank organized under state laws and having branches to become a national banking association and to retain said branches after nationalization. It is argued that there was no need of Section 5155, if national banks could have branches under existing law. But that argument must be considered in the light of the fact that state banks in 1865 were reluctant to nationalize their institutions. In order that any doubt on the subject might be settled and their reluctance to nationalize overcome, Section 5155 was enacted. It may well be argued that the reason of the enactment of the statute was that state banks might be assured of the same right to establish branches as then existed with respect to national banks under the National Banking Act of June 3, 1864. When this question was thus definitely settled, the reluctance of the state banks was overcome, and both state and national banks possessed the right to maintain their branches.

With state banks there was no limitation as to place, while with the national banks the limitation as to branches existed only as to the "place" wherein they maintained their main office. It is a matter which may be judicially noticed that at that time and at the present time state banks may have branches at different places in the State

and in some cases at the date of the enactment of the legislation in question state banks had branches in other states. National banking associations were then, as now, limited in their operations to the city, county, town or village, which is the "place" of their usual business. The opinion of the Attorney General, page 97, says:

"If the power existed for a national bank to have branches, there was no necessity for the express provision allowing the state banks, when converted to retain their branches."

When it is remembered that the national banking laws restrict a national bank to the county and city, town or village, the place of its location named in its certificate, then it is seen that this statute was quite necessary in order that all doubt might be removed as to branches of state banks not only within the cities and towns, but existing throughout the states.

We think this disposes of the argument based on the provisions of Section 5155.

We will now consider briefly the arguments of the Attorney General and of the Supreme Court of Missouri based upon two other acts of Congress. The Attorney General in his opinion says:

"By act of May 12, 1892 (27 Stat. 33), any national bank in Chicago designated by the World's Columbian Exposition was, upon approval by the Comptroller, authorized to conduct a banking office upon the exposition grounds, the time within which such branch might be operated being restricted to two years; and a similar act was passed March 3, 1901 (31 Stat. 1444), with reference to the establishment *by the banks of St. Louis* of branches on the grounds of the Louisiana Purchase Exposition."

It is true that the first statute referred to provided that any national bank located in the City of Chicago might be designated by the World's Columbian Exposition to conduct a banking office upon the exposition grounds and upon such determination being approved by the Comptroller of the Currency the bank would be authorized to open and conduct such office as a *branch* of the bank. But we are unable to follow the argument of the Attorney General. It might well have been that, by reason of the control by Congress of the World's Columbian Exposition through a commission created by a statute which gave the commission certain powers but not the power to establish a bank on its grounds, it became necessary that such a power should be specifically granted by Congress. The Act may have had that origin.

As to the question of the Louisiana Purchase Exposition, the Act of Congress of March 3, 1901, provided that any bank or trust company located in the City of St. Louis or the State of Missouri could be designated by the Louisiana Purchase Exposition to conduct a banking office on its grounds. That act was necessary because it extended the powers to any bank *within the State of Missouri*. It does not appear whether the Louisiana Purchase Exposition was actually in the City of St. Louis or not. The opinion of the Attorney General falls into error in stating that the Act was passed in reference to the establishment by the banks of *St. Louis only*.

CONCLUSION

For the foregoing reasons as well as for the reasons stated by counsel for the plaintiff-in-error, it is respectfully submitted that the judgment of the State Court was erroneous and should be reversed.

Respectfully submitted,

JOHN QUINN

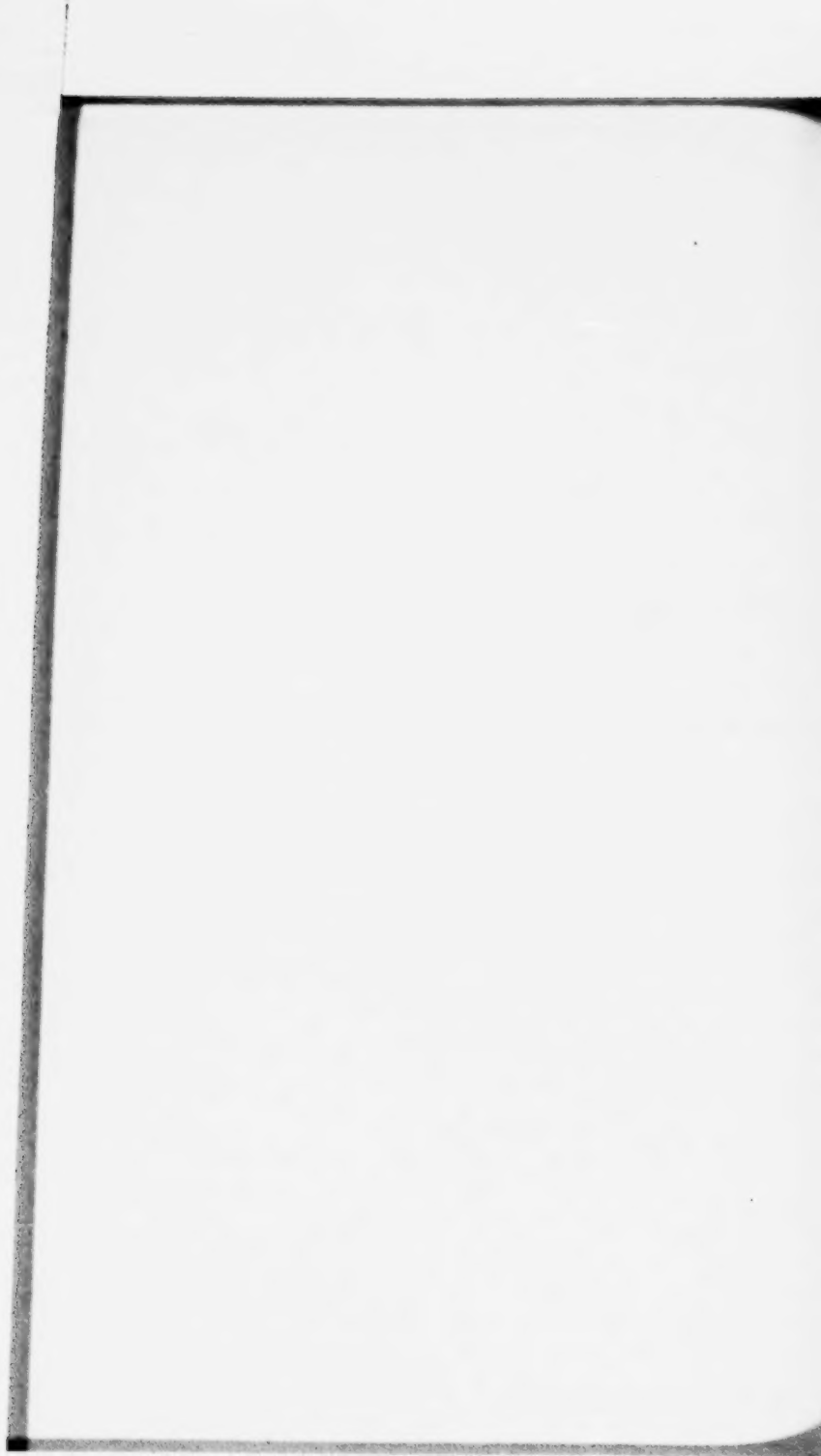
PAUL KIEFFER

ROBERT P. STEWART

Amici Curiae

31 Nassau Street, New York

April 28, 1923



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in Error and Petitioner in
Certiorari.

vs.

STATE OF MISSOURI, UPON INFOR-
MATION OF JESSE W. BARRETT, Attor-
ney-General,
Defendant in Error and Respond-
ent in Certiorari.

In Error to Su-
preme Court of
Missouri.

APPLICATION FOR LEAVE TO FILE SUGGES-
TIONS AND BRIEF AS AMICI CURIAE.

SUGGESTIONS, BRIEF AND ARGUMENT.

I.

**Application for leave to file suggestions and brief as
amici curiae.**

Now come Edward J. Brundage, Attorney General of Illinois, Frank E. Healy, Attorney General of Connecticut, George F. Schafer, Attorney General of North Dakota, John H. Dunbar, Attorney General of Washington, Herman L. Ekern, Attorney General of Wisconsin, Ben J. Gibson, Attorney General of Iowa, J. S. Utley, Attorney General of Arkansas, Clifford L. Hilton, Attorney General of Minnesota, Ulysses S. Lesh, Attorney General of Indiana, C. B. Griffith, Attorney General of Kansas,

William Rothmann, of Chicago, a member of the Bar of this Court, and West & Eckhart, of Chicago, Illinois, Special Assistants to the Attorney General of Illinois, and attorneys for United States Bankers Association Opposed To Branch Banking, and make application to the Court for leave to file in the above cause the suggestions, brief and argument annexed hereto, as *amici curiae*.

EDWARD J. BRUNDAGE,
FRANK E. HEALY,
GEORGE F. SCHAFER,
JOHN H. DUNBAR,
HERMAN L. EKERN,
BEN. J. GIBSON,
J. S. UTLEY,
C. B. GRIFFITH,
CLIFFORD L. HILTON,
ULYSSES S. LESH,
WILLIAM ROTHMANN,
WEST & ECKHART.

Buell Jones

II.

Suggestions.

It may well be assumed, and it is by us assumed, that all questions in which the State of Missouri alone is interested, arising upon this record, will be fully and satisfactorily dealt with by the counsel for defendant in error and respondent in certiorari.

Whatever the decision of this Honorable Court may be herein, it will necessarily affect interests which are of vital concern to the commonwealths and parties represented by these *amici curiae*, and while most, if not all of the particulars in which the decision will so operate concern also the State of Missouri, yet it is believed

that the suggestions and brief herewith presented may aid the Court in obtaining a just conception of the magnitude and extent of the interests involved, and these considerations we hope will constitute justification for this application.

Most, if not all of the states, whose Attorneys General appear on this brief, expressly prohibit state banks from establishing or maintaining branch banks, and in all of them the statutes relating to banking are deemed prohibitive of branch banking. It is obvious that in these states and in all others similarly situated (of which there is a number), the questions in this case to be decided are of very great importance. In a state where branches are prohibited to state banks such banks would obviously be under a tremendous disadvantage if national banks were to be permitted to maintain branches. In fact, it probably would result in the gradual elimination of state institutions from the banking field.

We believe that branch banking is thoroughly undesirable; that from a public standpoint it is objectionable in every respect; and that always and everywhere in the United States it is detrimental to the best interests of the public, and should be done away with. Yet we appreciate that so long as the system shall be permitted by a few states to continue, there should be no discrimination in such states, as between state and national banks, in respect to permission to maintain branches.

We wish to present some suggestions why branch banking should not be permitted to become rooted in any state whose laws do not now permit it, and why it should, so soon as practicable, be prohibited in all states.

It is the consensus of opinion, among those best qualified to judge, that a system which permits branch banking is prejudicial to the best interests of the state or country where it exists. An illustration of this fact

which is commonly cited, are the banking conditions which exist in Canada and the results which it is claimed have grown out of those conditions.

It is an astonishing fact that in Canada today there are but seventeen banks. These seventeen banks maintain nearly 5,000 branches, scattered throughout the various cities and villages of the Dominion. The parent institutions are located, seven in Toronto, five in Montreal and one each in Halifax, Quebec, Weyburn, Hamilton and Winnipeg. None of the other hundreds of cities and villages of Canada has a local bank. All of their banking facilities consist of branch banks.

Each of these branches is managed by an agent or branch manager. It has no other officer and no local board of directors. It receives deposits and forwards the same to the head office, keeping only enough funds on hand for current needs. All applications for loans in excess of nominal amounts must be submitted by the branch manager to the main office for rejection or approval.

There is no local bank west of Winnipeg. In Vancouver, for example, there are forty-eight branches of banks whose headquarters are in eastern cities. In travelling about Vancouver one observes signs of the Bank of Nova Scotia, the Bank of Montreal, the Bank of Toronto and the Bank of Winnipeg, but one looks in vain for the Bank of Vancouver.

That this system has had the effect of retarding the commercial, industrial and agricultural development of Canada and its cities, there cannot be the slightest doubt. At this time the population of Vancouver is approximately 120,000, of Victoria something under 40,000. Seattle, in forty years, has grown from 3,500 to more than 315,000. Portland, in the same period, has grown from 17,000 to 260,000. These four cities have substantially

the same natural advantages. Doubtless there are other reasons for the immensely superior development of Portland and Seattle, but unquestionably one vital factor is that each has a number of strong national and state banks. Each has a corps of real financial leaders interested in and devoted to the progress of their city. It is not conceivable that Portland and Seattle would so far have outstripped the Canadian cities mentioned, if they had been dependent for their banking facilities upon branches of New York, Boston, Philadelphia or Chicago banks, under the management of agents or branch managers. The evils of branch banking may briefly be summarized thus:

(1) *It eliminates the element of local pride and interest which each community takes in its own institutions.*

It requires but slight insight into human nature to realize that the people of any community have a pride in a bank owned by local stockholders, managed by local directors and conducted by local officers, which they could not possibly have in an institution called the "X National Bank of New York" or the "Y National Bank of Chicago," under the management of an agent or branch manager who may or may not be a resident and who probably is subject to removal from time to time and from branch to branch.

(2) *The stimulus and aid which banks under local control give to the building up of local industries is lacking.*

What has been said concerning the relatively greater prosperity of American cities as compared with those of Canada sufficiently illustrates this point.

A community is built up and developed by the making of discreet loans to pioneer enterprises and deserving business men and by financial advice as well as credit. The directors of a local bank are men intimately

related to the business life of their neighborhood. They form their judgments on first hand information. On the other hand, the officers and directors of a large bank in a remote city are interested in their own communities and enterprises. The natural tendency is to invest their funds in their own cities and immediate neighborhoods. They prefer to deal with men whom they personally know, rather than to loan to those about whom they know nothing, except from hearsay.

Applications for loans to a branch bank frequently are refused which should have been made. Local enterprises do not receive the financial credit which they should have. The entire community suffers and the development of the city and surrounding country is retarded. The branch bank in many instances becomes a mere gatherer of deposits which are forwarded to the parent institution.

(3) The tendency of branch banking is monopolistic and ultimately destructive of the independent bank system.

Twenty years ago, an eminent banker, speaking in favor of branch banking, argued that it did not mean monopoly and in substantiation of his contention, stated that independent local banks existed and prospered in competition with branch banks in the following Canadian cities and towns: St. Stephen, Prince Edward Island, Fredericton, Yarmouth, Nova Scotia, St. John and elsewhere. Today every one of the banks mentioned by him has passed out of existence. The Canadian year books show a steady decline of the number of banks in Canada until in 1904 there were only thirty-five. At the present time there are only seventeen, a decrease of fifty per cent in nineteen years. In England, as stated in the Encyclopedia Britannica, there were in 1842, 429 banks,

in 1900, 111, and in 1921, 41, or less than one-tenth the number that were in existence eighty years ago.

The branch bank is a formidable and well-nigh invincible competitor, for the reason, among others, that it is not required to pay capital stock tax at the place where located. Such taxes are paid only by the parent bank at the home office. The local independent bank must pay taxes not only on its tangible property, but also upon its capital stock. Moreover, the local bank must have a certain amount of capital, whereas the branch bank is not required to have any, nor is the parent bank required even to increase its capital. The branch bank, with the help of its mature parent, has the advantage of attacking the small independent bank in its infancy, and in many cases is able to crush it with the monopolistic weapon of competition at a loss.

The proponents of branch banking endeavor to meet these objections with the generalization that all economic conditions in Canada are different from those in the United States. They will in general admit that branch banking, as carried on in Canada, is a bad system and has operated injuriously in the Dominion. But they say the Canadian system is nation-wide and, therefore, of an entirely different character from anything that is proposed in the United States. Here, they say, no one wishes that banks shall be given power to establish branches throughout the nation; all that is desired is the right to establish a few branches in the same town where the parent bank is located. And it is argued that none of the evils incident to the Canadian system would result from branch banking of so restricted a scope.

But probably every system of branch banking began in a similar small way. And those who would like to see such a system in operation in the United States are far

too wise in the first instance to advocate nation-wide branch banking. That would, of course, be highly impolitic. They would naturally say just what they do say, viz., that they do not wish to operate branches outside of their own cities or towns. But if branch banking should once be recognized and established as a legitimate and desirable practice, there can be little doubt that gradually it would be extended beyond the limits of cities and reach into neighboring cities and presently become state-wide and ultimately nation-wide. That such results would follow can hardly admit of doubt. The bank which finds it profitable to maintain branches in its own city would naturally like to increase that profit by establishing as many branches as possible, and ultimately, we would have the Canadian system in all its vicious comprehensiveness.

Many other reasons might be cited why branch banking in the United States under present-day conditions would serve no useful public purpose, and on the other hand, would operate injuriously upon all public interests.

We appreciate, of course, that these considerations are more properly to be addressed to the legislative than the judicial department of our government, yet we deem them not inappropriate here, since it cannot be assumed that the Congress intended to authorize or permit in the national banking system any feature which it believed to be detrimental to the country's welfare. Hence, it may properly be argued that the omission expressly to authorize branch banking is an expression of public policy which should not be contravened by a judicial interpretation which would establish such permission by implication.

Since it is our purpose to endeavor to aid the Court, rather than to add to its labors, we shall confine our-

selves in our brief and argument to observations upon two points:

FIRST—THAT THIS COURT IN THE INSTANT CASE IS WITHOUT JURISDICTION, AND

SECOND—THAT BY THE NATIONAL BANKING LAW, NO AUTHORITY IS GIVEN TO MAINTAIN BRANCH BANKS, AT LEAST IN THOSE STATES WHOSE LAWS DO NOT PERMIT BRANCH BANKING.

III.

Outline of Brief and Argument.

A.

This Honorable Court is without jurisdiction to review the judgment of the Supreme Court of Missouri in this case for the following reasons:

1. *The decision sought to be reviewed rests at least in part on the independent ground of the violation of a statute of the State of Missouri.*

2. *Since the decision rests on the independent ground stated, this Court has no jurisdiction.*

(a) *When the decision of a state court is based upon a federal ground and upon an independent non-federal ground, this Court will not take jurisdiction on writ of error if the non-federal ground is sufficient in itself to sustain the judgment.*

Arkansas Southern R. R. Co. v. German Bank,
207 U. S. 270, 275.

DeSaussure v. Gaillard, 127 U. S. 216, 232.

Beaupre v. Noyes, 138 U. S. 397, 401.

Rutland R. R. v. Cent. Vt. R. R., 159 U. S. 630, 640.

(b) *Even if it be doubtful whether the decision of the state supreme court rested on a federal ground alone, or on a federal and non-federal ground jointly, this Court has no jurisdiction.*

Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 304.

Allen v. Arguimbau, 198 U. S. 149.

Adams v. Russell, 229 U. S. 353.

4. *The doctrine of the case of Illinois Central Railway Company v. Messina does not apply to this case.*

(a) *That doctrine applies only when it is doubtful under the state decisions whether the same result would have been reached apart from the decision on the federal question.*

Illinois Central Railway Co. v. Messina, 240 U. S. 395.

(b) *It is, of course, obvious that the decision of the Missouri Supreme Court in this case would have been the same if only the Missouri statute had been considered.*

In Arkansas Southern Railroad Company v. German National Bank, 207 U. S. 270, 275, the Court said:

"But according to the well settled doctrine of this Court, with regard to cases coming from state Courts, unless a decision upon a Federal question was necessary to the judgment, or in fact, was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate of itself, and which contains no Federal question, the same result must follow as a general rule. Moreover, ordinarily this Court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

And in *Cuyahoga River Power Company v. Northern Realty Company*, 244 U. S. 300, the Court, citing with approval earlier decisions, said in part (page 304) :

“But if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and a ground independent of the Federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.”

So in *DeSaussure v. Gaillard*, 127 U. S. 216, 232, the general rule is stated that to give this Court jurisdiction on a writ of error to the state Court it must appear affirmatively not only that a Federal question was presented for decision to the highest Court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

A very clear statement of the rule is found in *Rutland R. R. Co. v. Central Vermont R. R. Co.*, 159 U. S. 630, 640, where the Court said:

“It is well settled, by a long series of decisions of this Court, that where the highest Court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question.”

The Supreme Court of Missouri decided (Rec. 14) :

“That it (plaintiff in error) is and has been conducting said branch bank in violation of the laws of the *United States* and of the *State of Missouri*; and that in maintaining said branch bank and conducting the business of the bank throughout, it has usurped and is usurping authority, powers and privileges denied it by the laws of the *United States* and of *this state*.”

In its opinion (Rec. 26), the Supreme Court of Missouri held that "the attempt, therefore, of the respondent to establish a branch bank is not only in excess of its corporate powers but in violation of an express statute." (The statute referred to being Sec. 11737, R. S., Missouri, 1919, in which it is provided that "no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house.")

Thus it appears that the decision of the Missouri Supreme Court was based, at least in part, upon the violation by the bank of the statute of the State of Missouri, which is an independent non-Federal ground and is in and of itself sufficient to sustain the judgment. Under the uniform holdings of this Court, therefore, the writ of error should be dismissed.

B.

The National Banking Act confers no express authority on banks organized thereunder to establish and maintain branch banks nor is such authority conferred by necessary implication.

Section 5190, R. S., reads, "The usual business of each national bank shall be transacted at an office or banking house located in the place specified in its organization certificate."

The learned counsel for plaintiff in error and petitioner in certiorari argue that this section is not a limitation upon the number of offices or banking houses which a national bank may maintain, but rather that it is a command that it must maintain at least one office or banking house. In their brief and argument, page 68, is found the following: "Whoever heard of any corporation on earth being restricted by statute to doing business at one location in a restricted territorial area?"

The implication obviously intended is that no such thing ever was heard of and that it would be utterly absurd.

The answer to this and all similar suggestions is that there is not any **more** absurdity in restricting a bank to one single banking house than there is in restricting the bank to one single territorial area within which alone it is permitted to do business. Yet the existence of the latter restriction is in no wise questioned.

Suppose that the owner of a racing stable should enter into a contract to sell another "a" horse. Would any one contend that the meaning of the contract is that the owner obligates himself to sell at least one horse and as many more as the other party should decide that he wishes to purchase? Or suppose that a clothing merchant should say "I will sell you 'an' overcoat for \$50," would it be for a moment contended that the merchant could be compelled to sell more than one overcoat at that price?

We adopt the suggestion of counsel appearing on pages 68 and 69 of their brief, that the Congress is quite able to choose language clearly expressive of the purposes and intention of the legislation approved by it; hence the conclusion seems to us to be unavoidable that had Congress intended that the business of a national bank may be transacted at more than one office or banking house, it would have said in plain words "the usual business of each national bank shall be transacted at *one or more* offices or banking houses," instead of saying that it shall be transacted at *an* office or banking house. The fact that Congress used the language that it did use, rather than the other expression suggested, is highly persuasive of its intention to limit each national bank to a single office or banking house.

Section 5133, R. S., provides that the organization certificate for a national bank shall state, among other things (R. S., Sec. 5136):

"Second. The place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village."

The argument that the use of the indefinite article "a" or "an" does not denote an intention to limit a bank to a single office or banking house is a two-edged sword. If it has any merit then it may with equal propriety be argued that the requirement of the specification of "the place" wherein a bank's operations shall be carried on does not limit the bank to a single place, but permits it to establish banks in as many "states, territories or districts, counties, cities, towns, or villages," as it may choose. We do not understand that counsel for plaintiff in error contend for any such construction of Sec. 5136, but on the contrary they seem to concede that each bank is limited to one particular county, city, town or village and that one the one specified in its organization certificate.

It is, at any rate, clear beyond the slightest possibility of question, that power to maintain branch banks has not been expressly given. Is such power, as counsel so earnestly contend, among the powers which are necessarily implied or incidental? (Counsel treat the terms "implied" and "incidental" as substantially identical in meaning.)

It is argued (pages 59 and 60 of plaintiff in error's brief) that the legislative purposes in authorizing the creation of national banks "are best accomplished if the facilities for dealing between the bank and the public are increased and not restricted. Plainly, additional banking houses or offices located in the several business

centers usual in all large cities, mean, necessarily, increased opportunity to the business interests located in these several business centers to do their banking business at such additional banking houses or offices; and thereby the public purpose in the legislative mind is better accomplished; and in turn as this means increased custom for the bank, it necessarily follows that the private purpose in the legislative mind (as relates to the bank itself) is also better accomplished."

It is no doubt true that additional banking houses in the same city, town, or village, would bring increased custom to the bank (which, of course, is the primary and very likely the only reason why they are desired by the bank). It is also true that thereby additional banking facilities would be afforded to the general public. It may be conceded that it would be "convenient" and desirable, from the standpoint of the bank, to be permitted to establish branches. It may be conceded that the bank would probably be able to obtain a larger volume of business through the instrumentality of the branches. But to say that branch banks are necessary or essential to the full exercise of the powers expressly granted, is to state what is obviously untrue. A moment's reflection will make this very clear.

The powers given a national bank and the purposes for which it may be organized (so far as they here need be considered) are set forth in Clause 7th of Sec. 5136, R. S., in the following language: "to exercise * * * subject to law, all such incidental powers as shall be *necessary* to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes, according to the provisions of this Title."

Nowhere have counsel for plaintiff in error pointed out how, or in what manner, or in what respect it can possibly be *necessary* for a bank to have branches in order to be able fully and completely to exercise any and all of these powers. It would, of course, be absurd to say that a bank cannot successfully and completely discount and negotiate promissory notes or other evidences of debt without the aid of the instrumentality of branch banks. Equally absurd would it be to say that the lack of branch banks prevents a national bank from completely and successfully and satisfactorily "receiving deposits," or performing any one or more of the other enumerated objects. The most that can be said is that the bank probably will not have opportunity to discount or negotiate *as many* promissory notes; will not have opportunity to receive *as many* deposits or as many opportunities to buy or sell exchange. In other words, the bank will not be able to obtain as large a volume of business if restricted to a single banking house as it would if permitted to establish a banking house in every city block. The argument at most makes out a case for the desirability and expediency of branch banks from the standpoint of the national bank. It makes out no case whatever for the *necessity* of these instrumentalities and it will not do to argue that branches "are or may be 'needful,' 'proper' or convenient'" (brief, page 59) and that, therefore, their maintenance is within the implied or incidental powers of national banks, because this argument loses whatever force it might otherwise have when the express wording of the statute is considered.

The statute gives to the banks, not such incidental or implied powers as may be "proper," "appropriate" or "convenient," but by its express terms limits the incidental powers which may be exercised to such as "shall

be *necessary* to carry on the business of banking.” (Clause 7th, Sec. 5136.)

Here again it should be noted that, conceding, as it may be conceded, that the multiplication of branches in a given city or town would mean “increased custom for the bank and incidental increased opportunity to the business interests * * * to do their banking business at such additional banking houses or offices” (brief, page 60), the same argument may be made in favor of permitting a bank to establish branches in other cities, towns or villages, and in other states than that designated in the organization certificate as “the place where its operations of discount and deposit are to be carried on.” Yet no one contends, or has ever, so far as we are aware, contended that among the incidental or implied powers of a national bank is the power to carry on “its operations of discount and deposit” in any other city, town or village than that specified in the certificate. It may be that if the branch bank camel should succeed in thrusting under the tent of “implied powers” the nose of home city branches, the effort to force in the whole body of the beast will not be long delayed, although for the time being, activity is perceptible only in the proboscis.

It is very clear that express power to establish branches cannot be found in the statute and it is equally clear that “incidental” power to establish them is likewise not to be found, since the incidental powers recognized by the statute are restricted to such “as shall be *necessary*” and it certainly will not be seriously argued (as indeed it would be futile to argue) that such power is “*necessary*,” since national banks have existed, flourished, prospered, successfully performed their functions, and admirably served the public for nearly sixty years without the aid of branches.

For an admirable and unanswerable analysis of the whole question see opinion of Attorney General Wickersham in Vol. 29 of Opinions of Attorneys General at page 81, *et seq.*

It is interesting in this connection to note that the learned counsel for plaintiff in error evince a lively appreciation of the fact that "branch banks" are objectionable and in the State of Missouri unlawful. The "branch bank" is a cat which the learned counsel have carried as far away from home as possible and are striving mightily to lose. The effort is to convince this Court that the cat does not belong to them or their client.

The information filed by the Attorney General of Missouri specifically charges (Rec. 14) that the respondent did "open a branch bank"; that it is and has been conducting said "branch bank"; that it proposes shortly to open other "branch banks"; and that in opening and conducting said "branch bank" it is violating the law of the United States and of the State of Missouri. Yet in the brief of the counsel for plaintiff in error (p. 2), it is said that the information charges that the bank recently opened a "branch office"; that it intends to establish other "such branches" and that it is without authority of law to maintain "branch offices."

Throughout the brief and argument, the counsel, with meticulous care, strive to draw a distinction between "branch banks" and "branch offices." They wish this Court distinctly to understand that they have never opened any "branch bank" and do not intend to open one. All that they have done is to open a "branch office."

Naturally, the question suggests itself—why this effort to get away from the "branch bank" cat? Obviously it must be and can only be because the counsel recognize and appreciate the illegality of their client's

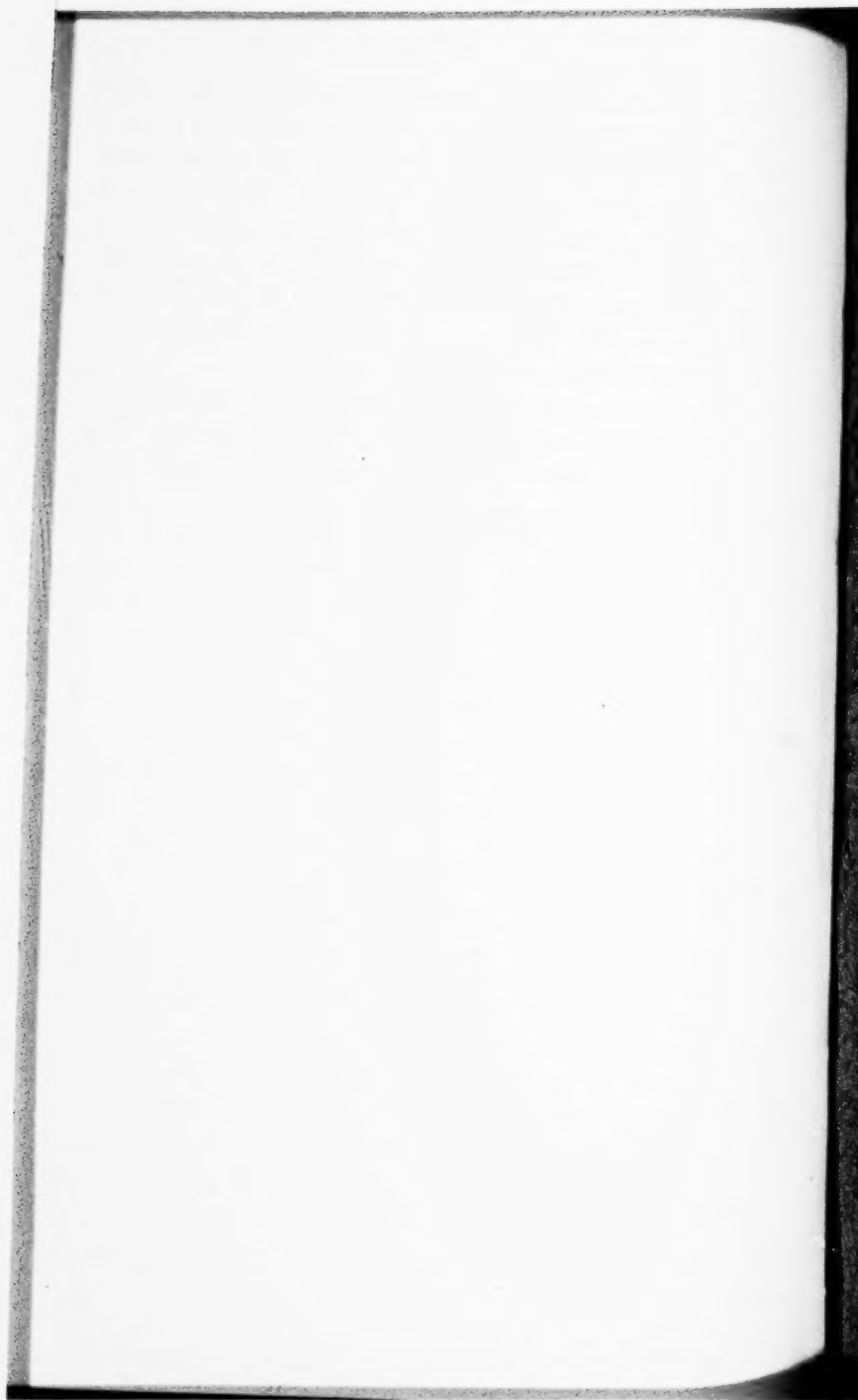
operating a "branch bank." If they believed that their client possessed the power and the right to operate branch banks, they would, of course, not have been under the necessity of resorting to this rather obvious camouflage—they would have admitted that the institution, the right to operate which is here in question, is a branch bank, and as such lawful, and would not have endeavored to hide behind the perfectly transparent disguise of a "branch office."

The learned counsel's attitude in the respect indicated is the most palpable sort of an admission that they recognize the illegality of branch banks in Missouri.

Respectfully submitted,

EDWARD J. BRUNDAGE,
FRANK E. HEALY,
GEORGE F. SHAFER,
JOHN H. DUNBAR,
HERMAN L. EKERN,
BEN. J. GIBSON,
J. S. UTLEY,
CLIFFORD L. HILTON,
C. B. GRIFFITH,
ULYSSES S. LESH,
WILLIAM ROTHMANN,
WEST & ECKHART.

Buell Jones



I N D E X.

POINTS.

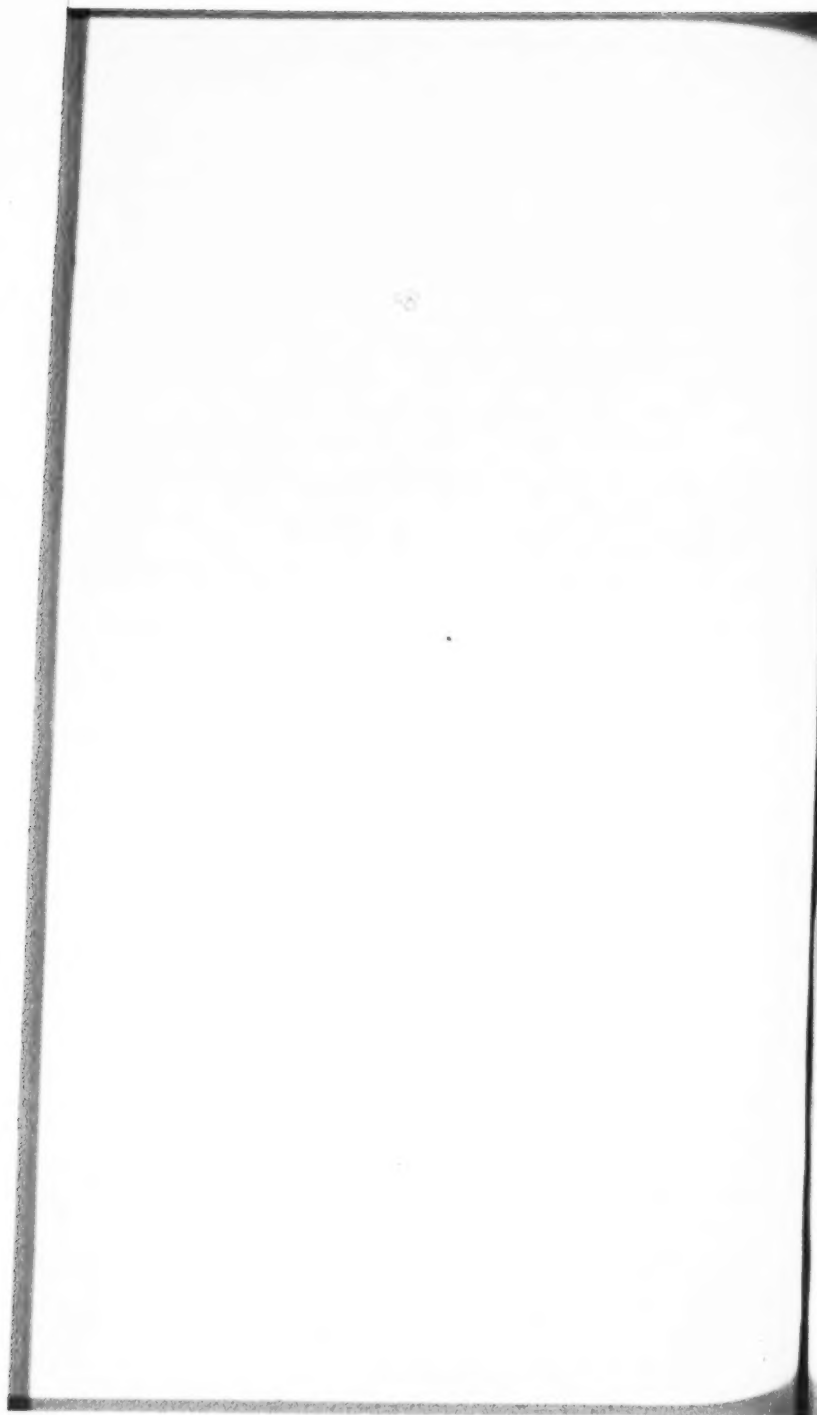
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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 919.

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in error,
vs.

STATE OF MISSOURI,
upon information, etc.

Brief, as *amicus curiæ*,
on the subject of
branch banks.

POINTS.

FIRST.

Meaning of the term, "branch banks".

In considering whether a national bank has the power to establish branches in the place where its principal office is located, the sense in which the term is used should be clearly understood. There are various systems of branch banking in different parts of this country and in foreign countries, growing out of the different conditions and processes of development.

In the present memorandum, the term will be held to comprise the right to have several branch offices or places of business in the place designated in the articles of association, where some of the powers of the bank may be exercised for the convenience of the community, as distinguished from the head office, where the business in its entire scope is carried on.

SECOND.**Some of the pertinent legislation on the subject.**

The National Bank Act was passed in 1863; but, in its present form, it dates from 1864 (13 Stat., 115). At the time of its enactment, the population of New York City was about 1,000,000, and that of the entire country was about 31,000,000.

By the Act of March 3, 1865 (R. S., Sec. 5155), a state bank with branches might become a national bank and retain its branches.

In 1875, a law was passed imposing a tax of 10% on the notes of state banks (18 Stat., 311); and no state bank has been able to issue any circulating notes since that Act took effect.

The national banks were originally chartered for only twenty years. In 1882, the period was extended for another twenty years (22 Stat., 162); and a further extension of twenty years was authorized in 1902 (32 Stat., 102); and, under existing law, the corporate existence has been extended to ninety-nine years (46 Stat., 767; Act of July 1, 1922, Ch. 257).

Under the Federal Reserve Act of 1913 (38 Stat., 259, Sec. 9), state banks becoming members of the Federal Reserve System retain all their charter and statutory rights.

By Section 25 of the Federal Reserve Act, national banks may be authorized to establish branches in foreign countries and insular possessions of the United States; and, by Section 3, Federal Reserve Banks may establish branches in their respective districts, upon obtaining the approval of the Federal Reserve Board.

By the Act of November 7, 1918, Ch. 209 (40 Stat.,), the consolidation of two or more national banks, with the approval of the Comptroller, was authorized.

THIRD.

State branch banks.

I. Maine, Michigan, New York and Ohio permit branches in cities *where the main office is located.*

II. Branches *throughout the State* are permitted in Arizona, California, Delaware, Georgia, Louisiana, Massachusetts, Mississippi, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia and Wyoming.

III. In the following States, branch banks are now prohibited, but, before the prohibitory legislation was enacted, branches were in many instances established :

Alabama, Arkansas, Florida, Indiana, Maryland, New Jersey, Washington, Wisconsin.

IV. In the remaining States, including Missouri, branch banks are at present prohibited.

From the foregoing summary, it will be seen that in the large financial and commercial centers, such as New York, Boston, Philadelphia, Detroit, San Francisco, etc., state banks are expressly permitted to establish branches.

NOTE. As authority for the above statement, see American Economic Review for December, 1922, p. 730.

FOURTH.

Chaotic and impossible consequence of holding that national banks cannot have branch offices in different parts of the same city.

The National Bank Act applies to the entire country and was, of course, intended to apply uniformly in all parts of the country. But this application cannot be made if it should be held that the Act must be construed with such severe strictness as to limit a bank, in its domestic operations, to one office in a single building.

Under the statutes heretofore referred to (*ante*, p. 2), in those States where a state bank may establish branches, it may become a national bank, with the right of maintaining all branches previously established. Thus, in the same community, there might be a national bank operating branches previously established under the state law, while all banks originally organized under the Federal law would be prevented from competing successfully with nationalized state banks having branches. To place itself on an equality with a nationalized state bank having branches, a national bank originally organized under the National Bank Act would have to go through the contortion of reorganizing under the state law, then establishing branches, and, thereupon, going back into the Federal system. Or, what has in a number of instances been done, it may acquire, by consolidation, one or more nationalized state banks having branches.

It is not reasonable to assume that Congress intended to permit some national banks, by indirect and expensive methods, to establish branches, while

denying that right to other banks that might not be in a position to accomplish the same result, either owing to the impossibility of acquiring the business of a state bank with branches, or owing to the practical difficulties in the way of changing to a state bank, acquiring branches, and then returning to the Federal system.

The business of national banks can be conducted only at a decided disadvantage in those States where state banks have established branches. In New York City, for instance, one state bank (The Corn Exchange Bank) advertises that it has fifty-three branches, through which it can serve the entire metropolitan district, while a much larger national bank, without branches, capable of furnishing even better facilities, would be limited to a restricted territory.

FIFTH.

National banks instrumentalities of Government.

National banks were originally created with the main object of assisting the Federal Government to finance the requirements of the Civil War, by providing a market for the obligations of the Government, which could be used by the banks as security for note issues. It was to prevent any interference with this power of the national banks that the Act of 1875 (*supra*) was passed, imposing a tax of 10% on notes issued by state banks. National banks are fiscal agents of the Government, in any capacity in which they may be found serviceable.

McCulloch v. Maryland, 4 Wheat., 316;
Osborn v. Bank of U. S., 9 Wheat., 738;
Farmers Nat. Bank v. Dearing, 91 U. S.,
29;

Davis v. Elmira Savings Bank, 161 U. S.,
275, 283;

McClellan v. Chipman, 164 U. S., 347;
Owensboro Nat. Bank v. Owensboro, 173
U. S., 664;

Easton v. Iowa, 188 U. S., 220, 238.

The foreign branches of national banks, authorized by the Federal Reserve Act, are expressly described as fiscal agents and are also recognized as instrumentalities for the furtherance of the foreign commerce of the country (Sec. 25).

SIXTH.

The National Bank Act paramount.

I. It is well settled that a State cannot pass an act which may conflict with Federal legislation affecting interstate commerce, or any other subject over which Congress has complete jurisdiction.

Gibbons v. Ogden, 9 Wheat., 1;

Brown v. Maryland, 12 Wheat., 419;

Minnesota Rate Cases, 230 U. S., 552;

Railroad Commission v. Worthington, 225 U. S., 101.

II. The principle is necessarily applicable to state legislation which may tend to give state banks an advantage over national banks.

(See authorities under preceding point.)

This was clearly recognized in *Davis v. Elmira Savings Bank* (*supra*), where this Court said, in an opinion by Mr. Justice White (p. 283) :

"National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows, that an attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the purpose of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court;"

and it was more recently recognized in *First Nat. Bank v. Union Trust Co.* (244 U. S., 416, 425-7).

III. If national banks have no power to have different places for the transaction of their business in a large city like New York, it would follow that state legislation conferring this power upon state banks would be void, as giving them an effective means of building up business at the expense of the national banks. To avoid this conclusion, which would result in inconceivable confusion, inconvenience and loss in all the large cities where branch banks under the state law have been established (*Yates v. Jones National Bank*, 206 U. S., 158, 178), the National Bank Act should be construed to permit the establishment of different places for the transaction of business, unless the Act clearly precludes such construction.

SEVENTH.

The place of business of a national bank.

The express provisions of the National Bank Act on this subject are found in Sections 5134 and 5190 of Revised Statutes, which are, respectively, as follows:

Sec. 5134. The organization certificate shall state, among other things:

"Second. The place where its operations of discount and deposit are to be carried on, designating the state, territory or district and the particular county and city, town or village."

* * *

"Sec. 5190. The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."

By the Act of May 1, 1886, Ch. 73 (24 Stat., 18), a bank may change its name or *the place* where its operations of discount and deposit are to be carried on, to any other place within the same state, not more than thirty miles distant, with the approval of the Comptroller of the Currency.

Full authority is conferred by the Act upon the board of directors, subject to the provisions of the by-laws, to exercise the express and incidental powers granted (R. S., Sec. 5136).

I. In *Merchants Bank v. State Bank* (10 Wall., 604), this Court said (pp. 650-1):

"The provisions of the Act of Congress as to the place of business of the banks created under it must be construed reasonably."

II. The "place" is the city, town or village where the operations are to be carried on; and the state and county in which the place is located must be designated.

The object of this requirement is to apprise the Comptroller where the association intends to conduct its business, as he has it in his power to prevent a bank from being organized to do business in a particular place, if he thinks that the community is already sufficiently served by existing banks, or for any other good reason (R. S., Secs. 5136, 5169).

III. The requirement that the usual business of each bank shall be transacted at an office or banking house located in the place specified in the organization certificate was intended to insure some visible structural location for the transaction of its usual business. The Congress which passed the National Bank Act must have had a lively recollection of the wild-cat banks that previously flourished, with such disastrous results to a confiding public. Some of these fly-by-night institutions sojourned in sheds (one in Illinois in the shed of a blacksmith shop), and some pitched their tents in vacant lots—a veritable sand-lot aggregation.

The substantial character of a proposed national bank having been assured by these and other requirements, with the approval of the Comptroller, how the business should be conducted, including the location of the office, was left to the board of directors and officers to determine, under such regulations as might be prescribed by the by-laws (R. S., Sec. 5136).

The directors would be remiss in their duty to their stockholders and to the community served by the bank if they did not provide facilities sufficient to enable them to meet the demands upon the bank. The Consolidated Gas Company of New York,

which this Court has recognized as a legitimate monopoly in the City of New York (*Willcox v. Consolidated Gas Co.*, 212 U. S., 19, 49), has no express power given to it by statute to establish branch offices; but it would be absolutely impossible for it to take care of its customers over the great territory controlled by it unless it had branch offices throughout the City; and the same is true of any public utility or business corporation. The business corporation laws of the different States, under which such corporations are organized, require the place of operations to be stated in the certificate of incorporation, just as is done in the National Bank Act; but no one has ever questioned the right of a business corporation to have as many different offices or places of business as the directors may see fit to establish.

This is also true of the British Statute of 1862 and its supplemental Acts, under which all business corporations of Great Britain, including the banks, have been organized. Those statutes confer no express authority to establish branch offices, and, like the National Bank Act, they require every corporation to have "a registered office"; but all banks incorporated under the statutes are allowed to establish as many branches and as many agencies as they may find desirable, not merely within the place of the registered office, but in all parts of the country and of the world. The British banking system, through the growth of London as a financial center, has naturally developed into one of branch banking, there being less than half a dozen great banks in London, and these banks have branches everywhere. The right to maintain such branches seems never to have been questioned in the courts, although the English reports have been filled with decisions on all sorts of *ultra vires* questions.

IV. A large business corporation may have its principal office in the downtown district of New York City, near a national bank with which it keeps its principal deposit account. But if that corporation has other offices throughout the City, as is usually the case, where money is received which must be deposited and where payrolls must be met, it would insist on banking accommodations in the immediate neighborhood of these offices, so as to avoid the danger of transporting large amounts of currency over a long distance, through crowded streets, a process attended with serious risk to both life and property. If a national bank has the account of such a corporation, the only way in which it can meet the requirements of its depositor is by having places of business throughout the City.

V. It could never have been intended that a national bank should transact *all* of its business within the walls of a single building, because that would frequently be an impossibility. Checks drawn on other banks are received for collection. These checks must either be presented separately to those banks for payment, or they must be presented at some common place agreed upon, as, for instance, a clearing house. The right to collect and pay checks through a clearing house has never been questioned; because, in large cities, it would be impracticable to transact this branch of the business in any other manner.

Drafts and notes are sent to a bank for collection in all parts of the world; and presentation must be made where they are payable.

A bank may buy and sell coin and bullion; but, in doing so, it must take or make deliveries at whatever place may be required by the terms of the contract.

The certification of a check for an amount larger than the sum standing to the credit of the depositor is expressly forbidden (R. S., Sec. 5208). The act of certification is one, therefore, which must be done with the greatest care, and, ordinarily, only after reference to the depositor's ledger and the ascertainment of the amount standing to the credit of the depositor at the time; and yet this Court has held that a cashier of a national bank may certify a check elsewhere than at the office of the bank.

Merchants Bank v. State Bank, 10 Wall., 604.

In that case, in considering the objection raised to the manner of certification, the Court said (pp. 650-1) :

"It is objected that the checks were not certified by the cashier at his banking house. The provision of the Act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person or by correspondents *or other agents* * * * There is no force in this objection."

And in *Bruner v. Citizens Bank of Shelbyville* (134 Ky., 283), the Court said :

"A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it."

VI. That a bank may have such offices or places for the transaction of its business as may be reasonably required, in the absence of any express au-

thority conferred upon it by statute, has been repeatedly recognized by this and other courts.

Bank of Augusta v. Earle, 13 Peters, 517;

Tombigbee R. Co. v. Kneeland, 4 How., 15;

City Bank of Columbus v. Beech, Fed. Cas., 2736;

Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.), 370;

Lathrop v. Commercial Bank of Scioto, 38 Ky., 114;

Pawcetts, Assignee, v. Mitchell, 133 Ky., 361, 365;

Frazier v. Wilcox, 4 Robb (La.), 517, 538;

William v. Creswell, 51 Miss., 817, 823;

Bank of Kentucky v. Schuylkill Bank, 1 Parsons (Pa.), 180, 227.

In *Bank of Augusta v. Earle*, the principal office of the Bank was located in Augusta, Georgia, but an agency was maintained in Mobile, Alabama, for the purpose of dealing in exchange. A bill of exchange in favor of Earle, a resident of Mobile, was accepted by the drawee and discounted at the Mobile agency of the Bank with funds placed there for that purpose. Earle sought to defend the suit on the ground that the Bank had no authority to enter into the contract outside the State of its incorporation.

In the course of the opinion, this Court said (p. 587):

"The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange, and consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given, clothed the corporation with the right to make con-

tracts out of the state, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state; and the general power to purchase bills, without any restriction as to place, by its fair and natural import authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; *and also to employ suitable agents for that purpose.* The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter, and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction."

The principle recognized in *Bank of Augusta v. Earle* is directly applicable to national banks, with the limitation that the domestic agencies permitted to them shall be located in the place of the principal office.

EIGHTH.

Future growth and expansion contemplated.

I. There is no limit to the amount of capital which a national bank may have (Act May 1, 1886; 24 Stat., 18). It must not have less than \$100,000, in cities with a population in excess of 50,000 (R. S., Sec. 5138).

The National Bank Act, as amended, contemplates the indefinite continuance of the life of a bank, and also the power to increase its capital as the demands of the community upon it grow. In a country which had reached a state of equilibrium and stagnation, there might be some ground for construing such a statute as the National Bank Act as limiting the right of a bank to one particular building; but no member of a legislative body in this country could at any time in its history have entertained the slightest doubt that, decade by decade, the country would steadily and progressively grow and develop in its industries and population. As early as 1774, Edmund Burke was so deeply impressed by the amazing strides in the material development of the country, that, in his speech on "American Taxation", he was led to exclaim that, "nothing in the history of mankind is like their progress".

All of our great cities show constant shifts in the localities where different lines of business have been carried on. The business of many of the national banks in these cities has been developed in connection with particular industries and patrons in their immediate neighborhood. But in the City of New York, complete lines of business have moved

from one part of the city to another, and the residential sections have yielded to the encroachments of business. Owing to these constant migrations and changes, a bank will see its business slipping away from it if it is helpless to accommodate its customers by establishing facilities to meet their requirements in their changes of location; and state banks with the right to establish branches wherever they please will be able to do this business at the expense of the shackled national banks.

II. A public utility cannot occupy the streets of a municipality unless it can show that it has acquired a special franchise enabling it to do so. Such franchises are, therefore, closely scrutinized and will not be extended by implication. But where a franchise is granted covering territory included within the limits of a particular municipality, and where subsequently the municipality has been enlarged by the annexation of adjacent territory, the franchise of the utility will extend to this territory and the utility will be under obligation to supply the persons resident in such territory.

People ex rel. Woodhaven Gas Light Co. v.

Deehan, 153 N. Y., 528, 533;

St. Louis Gas Light Co. v. St. Louis, 46 Mo., 121;

Grand Rapids v. Hydraulic Co., 66 Mich., 606, 612;

Illinois Cent. R. Co. v. Chicago, 176 U. S., 646, 666;

Russell v. Sebastian, 233 U. S., 195, 209.

The question involved is somewhat analogous to that once raised as to whether the Federal Constitution applied only to States in existence at the time of its adoption.

Town of Pawlet v. Clark, 9 Cranch, 292.

A national bank is not a strict public utility, though, in requiring it to obtain the approval of the Comptroller before it can undertake any business and in placing it under the supervision of the Comptroller afterwards, it is evident that there is a public interest involved, laying a certain obligation on the bank to meet the requirements of its customers in different parts of the community.

III. Where a bank has started with a small capital and has grown into a great institution, with a largely increased capital, it is inevitable that its original banking quarters will be outgrown. The plot on which its building stood may not be sufficient to provide it with the space required and it may not be able to purchase additional adjacent plottage; can it be successfully contended that it could not, under such conditions, acquire additional space in the neighborhood where some of its business could be conducted? If that is so, is there any specified area to which the bank is limited?

Under the power conferred by the Act of 1918, to accept individual trusts, is there any good reason why a national bank in the City of New York, in the Wall Street district, should not be permitted to have an office in the uptown residential district, where much of such business would naturally originate?

The power to retain a deposit might depend upon the power to supply the depositor with a safe deposit box for his securities in the vicinity of his residence; but a national bank in the Wall Street district would inevitably lose such a customer, unless it could maintain a local office for such purpose.

IV. A national bank cannot lend to any one person or corporation more than 10% of its capital and surplus (R. S., Sec. 5200).

The great railroad and industrial corporations of the country are constantly obliged to borrow large sums for their temporary purposes. Only banks with a large aggregate capital and surplus can meet the heavy demands of such corporations; and with the expansion of business and the growth in the size of business corporations, the banks must keep pace with this development, through the increase of capital or by means of consolidations with each other; but this cannot be done where the bank is limited to a single office in a large city, as the business would not justify it. The National Bank Act was not merely for yesterday or for today, but for the future; and if it has not sufficient flexibility to adapt itself to the constantly varying conditions of widely different communities, it will inevitably be superseded by the more pliant state laws.

NINTH.

Impossibility of affirmative legislation.

The suggestion naturally occurs, that if Congress intended that national banks should have the right to maintain a number of branch offices in a city, for the more convenient transaction of the various kinds of business arising in different localities, it would be a simple matter to have the Act amended by expressly conferring this power upon the banks. The conditions, however, are such that there is no hope of obtaining an amendment of this kind.

As to the fifteen sparsely populated States where branch banking is prohibited, the representatives in Congress of those States would never vote to allow a power to be exercised by national banks which was denied to their state banks.

As to the seventeen States where there is no express provision on the subject applicable to state banks, and where the state banks have not attempted to establish branches, it is equally certain that the representatives of those States would not favor an amendment of the National Bank Act which might give the national banks a distinct advantage over the state banks.

As to the large industrial States in which the great bulk of the banking business is done, where branches are permitted by state law, the state banks are so well satisfied with the advantage which they now possess, that they would never willingly permit their representatives in Congress to deprive them of it.

TENTH.**Alleged legislative and executive construction.**

In reaching the conclusion that national banks do not have the power to maintain more than one office for the transaction of their business, the Court below relied upon three Acts of Congress, upon assumed opinions of the Department of Justice, and upon the supposed practical construction placed upon the Act by the Treasury Department (Record, pp. 12-13).

I. The first Act of Congress referred to was the Act of March 3, 1865 (R. S., Sec. 5155), which provided that a state bank having branches might, upon becoming a national bank, retain its branches.

The Court below argued that this would have been unnecessary if Congress had been of the opinion that a national bank had the right to establish branches. But it should be borne in mind that, at that time, the country was still in the throes of the Civil War, that the National Bank Act had been passed to assist in financing the war and that Congress was, therefore, desirous of extending the national bank system by offering inducements to state banks to come into that system. The National Bank Act had been in force for such a short time that there had been no occasion to consider the question of whether it permitted the establishment of branches; and it was undoubtedly for the purpose of assuring the state banks that they would not be deprived of any powers by joining the national system that this express provision allowing them to retain their branches was made.

The Act of 1865, instead of being a legislative construction to the effect that banks organized under the National Bank Act had no power to establish branches, is obviously a construction to the exact contrary; because, it is not reasonable to suppose that Congress intended to establish a system of national banks with unequal powers, leading to unequal competition and to the resulting confusion which this Court pointed out in *Yates v. Jones National Bank* (206 U. S., 158, 178); and it is not conceivable that Congress would have made this express provision in favor of state banks if it had not been of the opinion that the right had been given to banks organized under the Federal law.

II. The other two Acts referred to by the Court below were those which permitted the establishment of branches at the Chicago and St. Louis Expositions. These Acts cannot be held to constitute any recognition on the part of Congress, that a national bank had no power to establish additional offices or agencies in the natural growth and expansion of its business.

Both Expositions were necessarily held in places remote from the ordinary business activities of the cities, where, in ordinary times, there would have been no business whatever for a bank to do; and, in the case of St. Louis, a portion of the grounds lay outside the city limits. The business, in each instance, was a special one, of limited duration, where it was desirable to make temporary arrangements for the convenience of the public; and it was only a reasonable precaution for the Commission to obtain express authority to that end.

III. *Construction by the executive officials.*

1. The subject of branch banking has only in recent years become a practical one. The great advantage enjoyed in the large commercial centers by state banks having branches, over national banks, as well as the advantage of some of the larger national banks, with branches obtained through consolidations, have, for the first time, made the question one of practical interest. For fifty years probably, there was no occasion for the Department to decide the question; and there is no evidence whatever of any practice, long continued or otherwise, on the part of the Comptroller, to confine national banks to a single building. It is obvious, indeed, that the question was never seriously considered, to the extent of providing a rule of action, until the opinion of Assistant Attorney General Fowler (approved by Attorney General Wickersham) in 1911 (29 Opinions Attys. Gen., 81).

Even in that opinion, however, in which there is an exhaustive review of the authorities, it is repeatedly recognized that a national bank may lawfully act in particular matters through agents outside of the main banking house, and may establish agencies for the transaction of different branches of the business, as distinguished from branches for transacting a general banking business. This conclusion was thus expressed in the opinion (pp. 86, 87):

"Those authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange or possibly to some other particular class of business incident to the banking business.

* * * * *

"These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business."

Taken as a whole, the reasoning of the opinion points to the broader conclusion reached by Mr. Wrisley Brown, then special assistant to the Attorney General, recognizing the right of national banks to establish branches, in the widest sense of the term.

The Court below made the statement (Record, p. 13), that "the Attorneys General of the United States have *uniformly* construed the National Bank Act as not authorizing the establishment of branch banks". No citations are given by the Court for this sweeping statement; but no opinion on the subject, other than the one above referred to, has been found.

2. So far as there has been any practical construction of the Act by Government officials in recent years, it has been in recognition of the right to establish branch offices. This was made clear by the present Comptroller of the Currency, in a letter published in the 1922 Supplement to Pratt's Digest (p. 7) :

"I am not authorizing the establishment of branch banks, but have been permitting banks, in states where state banks and trust companies have offices, agencies or branch banks, to establish additional offices in some of the large cities where it is necessary to meet the competition of state banks that have literally taken possession of cities with branch banks

or offices; and these facts are notorious and are well known to all state bankers of the country."

In the District of Columbia, three branch offices or places of business have recently been established by the Riggs National Bank, undoubtedly with the approval of the Comptroller of the Currency and equally without doubt to the satisfaction and convenience of the residents of the District, including possibly some of the members of this Court.

The records of the Comptroller's office show that the national banks in the country have established to date eighty-nine branch offices; and within the past few days, the Comptroller has given permission to the Chase National Bank of New York to open twelve additional offices in the City of New York.

ELEVENTH.**Possible impairment of national bank system.**

To hold that the National Bank Act does not permit a bank in a large city to open offices in different parts of the city for the more complete and effective transaction of its business, would be to drive many national banks into the state system; and in all the large and growing commercial centers, it would inevitably result in the supremacy of the state banks and the ultimate undermining of the national bank system.

New York, April 30, 1923.

JOHN A. GARVER,
Counsel for The National City
Bank of New York,
The Chemical National Bank
of New York.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK OF ST. LOUIS,
plaintiff in error (and petitioner for
certiorari),

v.

STATE OF MISSOURI, AT THE INFORMA-
tion of Jesse W. Barrett, Attorney
General, defendant in error (and re-
spondent for certiorari).

No. 252.

ON WRIT OF ERROR AND PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI.

MOTION OF THE UNITED STATES FOR LEAVE TO APPEAR AS AMICUS CURIAE.

Comes now the Solicitor General on behalf of the United States and moves the Court for leave to appear as *amicus curiae* and to be heard orally and by brief in the above-entitled cause.

The suit was instituted in the Supreme Court of Missouri by the Attorney General of the State, by information in quo warranto, to oust the Plaintiff in Error and Petitioner, a national bank organized under the laws of the United States and doing business in

the City of St. Louis, from conducting any of its business in a branch which it had opened at another place in said city than that in which it had been operating. An injunction was issued to restrain the bank from opening other contemplated branches. After judgment of ouster a writ of error was sued out, and an application is also pending for a writ of certiorari.

The contention of the defendant below was that the Attorney General of the State did not possess the power of visitation attempted to be exercised, that the court below was without jurisdiction, and that the proceeding was such a one as only the Government of the United States could maintain. The case was argued on May 7, 1923, and restored to the docket for reargument on November 12th next on the question whether or not a State has the right to challenge a national bank as to its methods of carrying out the provisions of its charter. As the case involves the right of a State to subject to its laws the operation of banks organized under Federal law, it is obviously one in which the United States has an interest. The Government challenges the right of the State of Missouri, either by statute or by judicial proceedings, to regulate or control national banks.

—On the question upon which the Court has directed reargument, and indeed the questions involved on the merits as well, the Government should, I respectfully submit, have an opportunity to be heard, as the decision of the case might affect the integrity and operation of the national banking system of the

country. The Solicitor General makes this motion at the request of the Secretary of the Treasury.

Notice of this motion has been served on counsel for both parties to the cause.

JAMES M. BECK,
Solicitor General.

OCTOBER, 1923.

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No. 252.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS, *Plaintiff in Error,*

vs.

STATE OF MISSOURI AT THE INFORMATION OF JESSE W.
BARRETT, ATTORNEY GENERAL, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF
MISSOURI.

ANSWER OF DEFENDANT IN ERROR TO MO-
TION OF THE UNITED STATES FOR LEAVE
TO APPEAR AS AMICUS CURIAE.

Mr. Solicitor General Beck, during the week prior to May 7, 1923, personally presented to this Court in this case, for filing, a brief prepared by John A. Garver, Esq., as counsel for The National City Bank

of New York and The Chemical National Bank of New York, as *amici curiae*. This brief supported the position of the plaintiff in error. The Solicitor General, therefore, then had knowledge of this case.

The case was argued May 7, 1923.

On May 21, 1923, this Court ordered a reargument on a single question named.

In September, 1923, the plaintiff in error served and filed its Substituted Brief in this case which, following the plan of its original brief, did not confine itself to the issue named by the Court but covered the whole case.

The pendency of this branch bank case has been known to bankers throughout the country and undoubtedly to the Secretary of the Treasury.

Last week the Solicitor General of the United States wired the Attorney General of Missouri, he would on October 15, 1923, ask this Court for leave to intervene on behalf of the Government.

Now, on October 15, 1923, with the case set for hearing November 12, 1923, Solicitor General Beck, on behalf of the Government at the instance of the Secretary of the Treasury, is submitting to the Court a printed application (a copy of which was never served on the Attorney General of Missouri, a point, however, hereby waived) for leave to file a brief on "the question upon which the Court has directed reargument and indeed the questions involved on the merits of the case as well." He asks "to be heard orally and by brief."

The application is to the effect that the Solicitor General will, if permitted, file a brief and argue orally on the side of the plaintiff in error.

We may say a copy of the printed motion of the Government was only secured for counsel of defendant in error at 4:45 p.m., October 13, 1923, after application had on that day been made for it.

The plaintiff in error is also applying on this 15th of October, 1923, to this Court for a reargument of the entire case because it states that the Attorney General of the United States has recently rendered an opinion to the Secretary of the Treasury affecting the question of the right of national banks to engage in branch banking, a copy of which opinion is attached to its application. It does not ask leave to file this opinion along with its Substituted Brief filed in September, 1923. It asks for "a reargument of the entire case." Whether it desires to file a second Substituted Brief or any further brief is not clear.

Under the practice of this Court these applications, we understand, will probably in usual course not be passed on until October 22, 1923.

The hearing date as stated is November 12, 1923.

We say that the application of the Government is inexcusably late and for that reason should be denied.

We can not know how the Court may view these applications.

We respectfully submit that the right and reason of the matter requires, if the application of the Government is granted, and if the hearing date of November 12, 1923 is retained:

(1) That the Government be required to file and serve its brief on or before October 31, 1923. (Whatever date may be fixed for the Government's brief, we assume will likewise be the date for the brief, if any, on any feature of the case, that the Court may allow

plaintiff in error to file, in addition to its Substituted Brief, which was filed and served in September, 1923.)

(2) That defendant in error file and serve its answering brief on November 10, 1923.

Respectfully submitted,

JESSE W. BARRETT,
Attorney General of Missouri.
ROBERT C. MORRIS,
HAROLD R. SMALL,
Of Counsel,
For Defendant in Error.

Washington, D. C.,
October 15, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS,
plaintiff in error,

v.

STATE OF MISSOURI AT THE INFORMATION
of Jesse W. Barrett, Attorney General.

No. 252.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
MISSOURI.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT OF THE CASE.

By permission of the Court, this brief is filed by the United States as *amicus curiae*.

Its interest in the litigation is obvious. The case not only affects the true construction of an important Federal statute, but involves the integrity of the national banking system.

If the State of Missouri has the right to institute this proceeding to restrain an alleged excess of power by a Federal instrumentality, then every constituent State of the Union has a like visitatorial power, and in that event the national banking system of the

United States is subject not alone to one master, but to forty-nine.

The United States, therefore, intervenes to assert the immunity of one of its fiscal instrumentalities from State supervision or regulation.

When this Court ordered a reargument and directed the attention of counsel to the question of the right of the State of Missouri to institute the proceeding, it seemed incumbent upon the Federal Government to assert its right to regulate and control its own fiscal instrumentality.

Hence, this brief.

This was an original proceeding in *quo warranto*, instituted by the Attorney General of Missouri in the Supreme Court of that State, to determine the authority of a national bank engaged in business in the city of St. Louis to establish and conduct a branch at another than its regular place of business in that city.

On February 25, 1863, an Act of Congress was approved under the title of "An Act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof." (12 Stat. 665.) Since that time Congress has passed many supplemental and amendatory statutes, and these statutes are, under the Act of June 20, 1874 (18 Stat. 123), called "The National Bank Act."

This act vests in the Comptroller of the Currency power to supervise all the operations of national banks.

Under its provisions he is specifically authorized to bring suit in the United States courts for the forfeiture of the charter of any national bank which violates any provision of the National Bank Act and thus acts in excess of its corporate powers. (Sec. 5239, Revised Statutes, U. S.) He is empowered to regularly examine such banks for the purpose of determining whether their operations are conducted according to law. (Sec. 5240, Revised Statutes, U. S.) After authorizing such examinations, Section 5240 (as amended by Section 21 of the Federal Reserve Act, 38 Stat. 271) provides that—

No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either house thereof or by any committee of Congress, or of either house duly authorized.

Giving to this language its usual or ordinary interpretation, it seems clear that Congress intended that the Comptroller of the Currency should have the "visitatorial" power to enforce a proper observance of the provisions of the National Bank Act. It clearly intended that the sole master of the national banking system should be the Sovereign which had created it.

As applied to charities, the language "visitatorial power" has been defined by the courts as—

A mere power to control and arrest abuse and to enforce a due observance of the stat-

utes of the charity * * *. *Allen v. McKean*, 1 Fed. Cases No. 229, p. 498; 1 Sumn. 276, 300.

While this expression, as used in the National Bank Act, does not appear to have been defined by this Court, the provisions quoted were obviously intended to prevent other agencies than those mentioned from seeking to control the operations of national banks. The proceedings instituted by the Attorney General of Missouri are an obvious attempt to exercise visitatorial powers over the operations of such banks.

This action of the Attorney General and of the trial court therefore constitute a violation of these specific provisions of acts of Congress, unless the Supreme Court of Missouri inherently has jurisdiction to try cases of this sort or unless Congress has vested it with such jurisdiction.

ARGUMENT.

I.

Want of Jurisdiction of the Trial Court.

The Supreme Court of Missouri apparently assumed jurisdiction in this case on two grounds:

(1) Under its interpretation of the National Bank Act, based upon the "customary rules of construction," the establishment and operation of a branch bank constituted at least an *ultra vires* act on the part of the respondent bank. On this point the court below said (R. 16):

This is not a proceeding to deprive the respondent of any right or limit the exercise

of any power conferred upon it by the *laws of the United States*; but to prevent it from committing an act in violation under the established rules of construction, of the laws of its creation * * *. (Italics ours.)

The Supreme Court of Missouri thus assumed the right to determine the extent of powers vested in national banks by the laws of the United States and to prohibit the exercise of any power which, in the opinion of the court, was not vested in the respondent bank.

If this is not an exercise of visitatorial power, what is it?

(2) Jurisdiction was also assumed on the ground that the exercise of the power in question expressly contravenes a State statute and that this State statute was not in conflict with the express terms of any act of Congress.

If this is not an attempt by a State to regulate a Federal instrumentality by the laws of the State, what is it?

The United States alone may inquire by Quo Warranto whether a National Bank, in operating as such, has acted in excess of its corporate powers.

It is not questioned in this proceeding that the First National Bank in St. Louis is a duly incorporated national bank and, as such, a fiscal instrumentality of the Federal Government. If a bank attempted to do business under the claim that it was a national bank, and the State of Missouri could show that, as a matter of fact, such a bank was

never incorporated by the Federal Government, and, as a Federal instrumentality, had no existence, then the fact that such pretended institution was transacting business within the State of Missouri would give that State full power to determine by what authority it was attempting to function as a corporate entity.

Such is not this case; for the information concedes the due incorporation of the bank in question, and only challenges its right to do certain corporate acts.

While an ouster is prayed for, yet none was asked and none was given as against the corporate entity. What was attempted was to restrain by a pretended ouster a Federal instrumentality from operating its branches in the State of Missouri, and the relief granted was essentially an injunction, which sought to restrain the bank from maintaining certain branch offices in the State of Missouri.

The court first granted a temporary restraining order, in the teeth of Section 5242 of the Revised Statutes, which provides that—

no attachment, *injunction* or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (Italics ours.)

The distinction between a pretended corporation which has no corporate franchise and a legal corporation which misuses such franchise is, in a proceeding of this character, a clear one; for the power

to restrain the abuse of a corporate privilege is essentially visitatorial, and, to subject a Federal instrumentality to the visitatorial powers of a State is to subject a Federal instrumentality to the rule of two masters—and this our system of government forbids. If it did not, it would perish.

No other case has come to our attention wherein one sovereign has successfully attempted by *quo warranto* in its own courts to define the limits of a franchise granted by another. Certainly the case of *Standard Oil Company v. Missouri*, 224 U. S. 270, relied upon by the Supreme Court of Missouri, is not a precedent. This and others which might be cited are authority for the obvious proposition that a state may inquire whether a foreign corporation, not a Federal instrumentality, is lawfully exercising within its boundaries the right and privilege of doing business there. This is clearly within its jurisdiction. Since *Bank of Augusta v. Earle*, 13 Pet. 519, it has been settled that a foreign corporation, having no Federal right to transact business in a State, can only do so with the express or implied sanction of such State and under such reasonable and nondiscriminatory regulations as it may see fit to enact. Accordingly, it is within the province of the State to inquire at any time whether the privilege voluntarily accorded by it to a foreign corporation is being abused or misused. But this bank is not in Missouri by the grace of that State. It is there by the paramount authority of the United States. Concededly the First National Bank in St. Louis has been created

as an instrumentality of the Federal government to carry out, within the territorial limits of the United States, a power constitutionally vested in the national government. (*McCulloch v. Maryland*, 4 Wheat. 316.) It holds no franchise from the State of Missouri. It needs none. It is there not by sufferance, license, or franchise from the State of Missouri, but by virtue of a franchise granted by the United States. It has power to exercise its franchises in Missouri, not because of any permission obtained from the State but because Missouri is within the territorial limits of the United States.

We believe that the learned Attorney General of Missouri would agree that no other State by a proceeding in *quo warranto* in its courts could render a valid judgment fixing the limits of a franchise to be exercised by a Missouri corporation within the State of Missouri. And by the same token it can not render a valid judgment fixing the limits of the franchises of a Federal corporation.

The ancient writ of *quo warranto* was a high prerogative writ in the nature of a writ of right for the Sovereign, against one who usurped or claimed any office, franchise, or liberty of the Crown, to inquire by what authority he claimed the right. (3 Blackstone, 262; High on Extraordinary Legal Remedies, 3d Edition, p. 544.)

A franchise or liberty was defined as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of the subject." (2 Blackstone, 37.) The Sovereign alone might inquire who should hold it, how

it should be exercised, when its limits had been exceeded, or when its exercise had been abandoned. By the theory of the feudal law the king was the fountain whence all franchises or governmental prerogatives were derived, and the exercise by a corporation or an individual of any of these prerogatives, without a grant from the king, was necessarily a usurpation of a prerogative of the Sovereign.

The ancient writ was a purely civil proceeding. In course of time it was superseded by the speedier remedy of an information in the nature of *quo warranto*. (*Territory v. Lockwood*, 3 Wall. 236, 238.) This proceeding was criminal in character and led to judgment, not only of ouster, but of a fine for the usurpation. (*Standard Oil Company v. Missouri*, 224 U. S. 270, 283.) In either proceeding, however, the king was the person aggrieved, and it was upon his initiative that the actions were begun. Accordingly, both by reason of the old feudal theory that all prerogatives belonged to the king, and by reason of the theory still prevailing that crimes are offenses against the Sovereign and to be prosecuted as such, the king as head of the government was viewed as the sole party interested in the prosecution of the remedies by *quo warranto*.

The legal history of the development of these remedies is curious and interesting. It shows that the various statutes passed by Parliament to regulate its use have been designed as limitations upon the powers of the king and not for the purpose of afford-

ing to the subject a remedial writ whereby he might obtain some right which belonged to him or redress some injury suffered. Lord Coke tells us, 2d Inst. 277-280, that prior to the Statute of Gloucester, 6 Edw. 1 (1278), some evil counsellors persuaded the king, who was in need of money, that he might obtain all that he required by the simple expedient of forfeiting all royal franchises where the holders could not produce evidence of the original grant. The royal proclamation was accordingly issued directing all who held such franchises to appear before the king's commissioners appointed for the purpose and to submit such evidence of their original grants as they might have. In all cases where sufficient evidence was not produced the king forfeited the franchises and granted them to others upon such consideration as he chose. The manifest injustice of this proceeding occasioned the Statute of Gloucester, which restrained the power of the Crown so that franchises might be forfeited only after a judicial proceeding.

The history of the writ from that day until modern times is closely intertwined with the long struggle between the Crown and the people. During the reigns of the later Stuarts, when the judiciary were quite subservient to the Crown, the writ was used to obtain control of the municipalities of the kingdom. To such an extent was the jurisdiction carried that in the celebrated case of the City of London the entire liberties, privileges, and franchises of that great city were seized by the king, where they remained for a period of

four years, until James II, becoming terrified at the threatened invasion of the Prince of Orange, saw fit to restore the charter. By subsequent Act of Parliament it was provided that the charter of the City of London could not for any cause be forfeited.

Notwithstanding the experience which Parliament and the people had through many centuries of the use of this prerogative writ, and notwithstanding many efforts by statute to limit the use of it, we find no legislation which places in the hands of anyone other than the sovereign the right to initiate proceedings in *quo warranto* to try the exercise of public franchises.

When our Republic was formed with a dual sovereignty, the nation and the constituent States, each in their respective spheres, succeeded to this prerogative of the Crown.

The question as to what authority may inquire into the exercise of a Federal office or franchise is not entirely new in this Court. In *Wallace v. Anderson*, 5 Wheat. 291, this Court held that the right to hold a Federal office could be questioned only in an action begun in the name of the United States. In *Territory v. Lockwood*, 3 Wall. 236, it was held that the Territory of Nebraska had no right by a proceeding in *quo warranto* to test the right of a person to exercise the functions of a judge of the Supreme Court of the Territory. The Court said (page 240):

the subject is as much beyond the sphere of its authority as it is beyond the authority of the states as to Federal officers whose duties are

to be discharged within their respective limits. The right to institute such proceedings is inherently in the government of the nation. We do not find that it has been delegated to the Territory.

A similar question was presented to the Supreme Court of Connecticut shortly after the enactment of the National Bank Act, and in an opinion of unusual clarity and strength that court held that an information in the nature of a *quo warranto* would not lie in a State court to try the right to the office of director in a National Bank. (*State v. Curtis*, 35 Conn. 374.)

The reasoning of these opinions seems clearly applicable to the case at bar and conclusive upon the question of the power of the State of Missouri.

Indeed, no other authority for our contention seems to be required in addition to the great decision in *McCulloch v. Maryland*. It said the first and almost the last word on this fateful subject. The great Chief Justice apparently exhausted the reasoning in such a case and established forever the immunity of federal instrumentalities from State interference or attack.

National banks organized under the National Bank Act are instruments designed to be used to aid the Federal government in the administration of its powers. As was said in *Davis v. Elmira Savings Bank* (161 U. S. 275, 283):

National banks are instrumentalities of the Federal government, created for a public

purpose, and as such necessarily subject to the paramount authority of the United States.

This is the only warrant for their creation by Congress. (*McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 Wheat. 738.)

A State court can not impede or suspend the operation of a Federal instrumentality upon the ground that the act of Congress under which the Federal instrumentality is operating is unconstitutional, nor does it confer the power now sought to be exercised, for the reason that it is not within the power of the State to stay the operations of the Federal government. This principle has been recognized and enforced in a long line of cases in which states have undertaken to interfere with Federal officers and instrumentalities in the discharge of duties which were being exercised under Federal statutes, or even under the color thereof.

One of the leading cases on this subject is *Ableman v. Booth* (21 How. 506). In that case the Supreme Court of Wisconsin held that the fugitive slave law was unconstitutional and discharged a prisoner held under a warrant issued by a United States Commissioner for aiding and abetting the escape of a fugitive slave, and also discharged the same person from confinement after indictment and conviction in the United States District Court. This judgment of the Supreme Court of Wisconsin was reversed by this Court.

The same question was presented in *Tarble's Case* (13 Wall. 397), where a soldier in the United States

Army was discharged on habeas corpus by a Supreme Court Commissioner of the State of Wisconsin on the ground that he had been unlawfully enlisted while a minor without the consent of his guardian.

In both cases the courts of the State were declared by the Supreme Court of the United States to have been without jurisdiction.

It is uniformly recognized that the courts of a State possess no jurisdiction to pass upon the constitutionality or construction of a United States statute or treaty in such a way as to paralyze the performance of a duty enjoined by such statute upon a United States official. The limit of power is reached the moment the hand of the State is laid in restraint of a Federal agency, because the judicial control of the agency is within the exclusive jurisdiction of the Federal Government. This is fundamental in our dual system of government in which the Constitution and laws of the United States and treaties made under its authority are the supreme law of the land. The principle is clearly stated in *Tennessee v. Davis* (100 U. S. 257), as follows (pp. 262, 263):

"The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the

state, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the state court, the operations of the general government may at any time be arrested at the will of one of its members.

* * *

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in a number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

It follows from what has been said that a State court can not hear and determine the question whether the laws of the United States justify the performance of an act by a Federal agency. If it could do so, it could in this way exercise a paramount power and frustrate, at least temporarily, the lawful activities of the Federal government.

Many cases have arisen where persons held by the state authorities have been discharged by the Federal courts or judges on the ground that the act complained of was done under authority of the United

States or the process of its courts, and that the State court was, therefore, without jurisdiction. (*In re Neagle* (1890), 135 U. S. 1; *United States v. Fullhart* (1891), 47 Fed. 802; *Ex parte Conway* (1891), 48 Fed. 77; *Kelly v. State of Georgia* (1895), 68 Fed. 652; *In re Waite* (1897), 81 Fed. 359; affirmed C. C. A. 1898, 88 Fed. 102; *In re Lewis* (1897), 83 Fed. 159; *In re Thomas* (1897), 82 Fed. 304; affirmed C. C. A. 1898, 87 Fed. 453; (1899) 173 U. S. 276; *In re Weeks* (1897), 82 Fed. 729; *In re Comingore* (1899) 96 Fed. 552; affirmed (1900) 177 U. S. 459; *In re Fair* (1900), 100 Fed. 149; *Anderson v. Elliott* (1900), 101 Fed. 609; *United States v. Fuellhart* (1901), 106 Fed. 911; *In re Turner* (1902), 119 Fed. 231; *In re Matthews* (1902), 122 Fed. 248; *In re Laing* (1903), 127 Fed. 213; *Ex parte Gillette* (1907), 156 Fed. 65; *Drury v. Lewis* (1906), 200 U. S. 1; *Hunter v. Wood* (1908), 209 U. S. 205; *Pundt v. Pendleton* (1909), 167 Fed. 997.)

A notable case is *Ohio v. Thomas* (173 U. S. 276), where the governor of a soldiers' home was arrested for violating the State law of Ohio in the use of oleomargarine. The Court said (p. 284):

Assuming, in accordance with the decision of the state court, that the act of the Ohio legislature applies in terms to the soldiers' home at Dayton, in that State, we are of opinion that the governor was not subject to that law and the court had no jurisdiction to hear or determine the criminal prosecution in question, because the act complained of was performed as part of the duty of the governor as a Federal officer in and by virtue of valid Federal

authority, and in the performance of that duty he was not subject to the direction or control of the legislature of Ohio.

The principle for which I contend clearly applies to national banks as Federal agencies as well as to officers of the United States. As a matter of fact it was applied by this Court to banking institutions acting as fiscal agents of the Government at an early period of our national history and has been consistently recognized as applicable to such institutions since that time.

In the leading case of *McCulloch v. Maryland* (4 Wheat. 316) the first Bank of the United States had established a branch in the State of Maryland. The legislature of that State by an act passed February 11, 1818, imposed a tax on all banks or branches thereof in the State of Maryland not chartered by the legislature. In dealing with the right of the Maryland legislature to impose this tax the court stated, *inter alia*:

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. * * *

The court has bestowed on this subject its most deliberate consideration. *The result is a conviction that the states have no power, by*

taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared. (Italics ours.)

Conceding the principle, so clearly and finally established in *McCulloch v. Maryland*, that the legislature of a state can not define the duties of national banks or control their affairs, it would follow that inasmuch as Congress has defined the duties and powers of national banks, has prescribed penalties for violation of the laws of the United States, and has vested in an officer of the United States the power to see that such laws are duly observed, any attempt on the part of the courts or officers of the state to control the exercise of national banking powers would be an assumption of power not vested in a State or any agency thereof in the absence of express authority from Congress.

Congress has vested no power in the State Courts by Quo Warranto or other proceedings to control the operations of National Banks. On the contrary, it has expressly forbidden it.

The instances in which and the extent to which national banks are subject to the jurisdiction of State courts are governed by the Act of July 12, 1882, Chap. 290, Sec. 4, 22 Stat. 163, and by the Act of August 13, 1888, Chap. 866, Sec. 4, 25 Stat. 436.

ACT OF 1882.

The Act of July 12, 1882, provides in part that—

The jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, *except suits between them and the United States, or its officers and agents*, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun
* * *

It will be observed that this statute expressly excludes from its operation suits between national banks and the United States or its officers and agents. As we have already seen Congress has specifically provided for suits to be brought by the Comptroller of the Currency against national banks violating any of the provisions of the National Bank Act and designated the United States Courts as the proper forum for the trial of such suits.

Section 5239, Revised Statutes of the United States, provides in terms that —

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation

shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, *in a suit brought for that purpose by the Comptroller of the Currency*, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation. (Italics ours.)

It will be noted that this section not only specifies the court in which suit is to be brought but expressly provides the penalties for the violation of the provisions of the National Bank Act, namely, forfeiture of the charter of the bank and responsibility of the directors for the losses sustained.

If the State courts are without jurisdiction to try suits instituted by an officer of the United States who is specifically vested with power to enforce compliance with the National Bank Act, *a fortiori*, they are without power to try such suits when instituted by state officials who have no authority from Congress to exercise such visitatorial powers,

ACT OF 1888.

The Act of August 13, 1888, provides in part that (25 Stat. 436)—

All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them,

real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

Here again the statute expressly reserves to the United States courts jurisdiction to try suits brought by the United States or by the direction of any officer thereof or suits for the winding up of the affairs of a national bank. It extends jurisdiction to the State courts only in those cases where the court would have jurisdiction as between two of its citizens. (*Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778.)

Whenever an individual can sue in a State or Federal court, a national bank can do the same thing, and whenever the Federal courts are not open to individuals, neither are they open to national banks. (*Petri v. Commercial Bank*, 142 U. S. 644; *Guthrie v. Harkness*, 199 U. S. 148.)

It can hardly be contended that either of these statutes vests in the State courts the right to try suits brought against national banks which Section 5239, Revised Statutes of the United States, expressly provides shall be brought by the Comptroller of the Currency in the United States courts.

Assuming, therefore, that State courts are without the inherent power to enjoin a national bank from exercising a power claimed under a Federal statute and that Congress has not expressly authorized State courts to exercise this power, the question remains whether any State law can constitutionally vest this authority in the State courts. This brings us to a consideration of the statutes of Missouri which the lower court has held have been violated by the establishment of a branch bank.

Alleged Contravention of State Law.

The Supreme Court of Missouri calls attention to the fact that Missouri banking business can be conducted only by a corporation; that thus organized the extent of its power must be determined by the statute of its creation; and, continuing, states that (R. 14-15)—

The state banking act gives express recognition to this rule in providing that banks, whether incorporated under Federal or State law, can transact only such business as is permitted by the laws of the United States or of the state. (Sec. 11684, Mo. R. S. 1919.)

Continuing, the court says (R. 15):

Branch banks, not having been permitted by the state law either by express terms or necessary implication, the well-recognized canon of construction will authorize the exclusion of this power from those granted. Reliance upon this rule is, however, unnecessary in the presence of a subsequent section (Sec. 11737,

R. S. 1919) in which it is provided "That no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house." The attempt, therefore, of the respondent to establish a branch bank is not only an act in excess of its corporate powers but in violation of an express statute.

Considering first Section 11684, Missouri Revised Statutes, 1919, *supra*, which provides that banks, whether incorporated under Federal or State law, can transact only such business as is permitted by the laws of the United States or the State, it is conceded that national banks can exercise only such powers and transact only such business as permitted by the laws of the United States. For this violation, however, as we have already seen, Congress has prescribed specific penalties and has authorized the Comptroller of the Currency to bring suit in the United States courts to determine whether a given bank is guilty of such violation. The determination of the fact of such violation and the appropriate remedy is for the Federal Government in a suit by the Comptroller.

This being true, this limitation of the State law, if it can be fairly construed as an applicable limitation, is of no practical effect. In other words, if the State law prescribes a penalty for the exercise of any power by a national bank which is not authorized by the laws of the United States, it is entirely clear under the decisions of the courts that the national bank would not be subject to such penalty.

Section 5197, Revised Statutes of the United States, limits the rate of interest that may be charged by a national bank to that permitted by the State in which it is located but prescribes a specific penalty for the violation of this provision. In the case of *Farmers National Bank v. Dearing*, 91 U. S. 29, an attempt was made to subject a national bank to the penalty prescribed by a State law for charging a rate of interest in excess of that permitted under the State law. The State of New York fixed as a penalty forfeiture of the entire debt, whereas Section 5197, Revised Statutes of the United States, provides for the forfeiture of interest only. The court held that the penalty prescribed by the State law could not be applied, but the bank was subject only to the penalty prescribed by Section 5197, Revised Statutes of the United States.

The same principle is here involved. A national bank, exercising a power it is not authorized by the laws of the United States to exercise, is guilty of a violation of the laws of the United States. If Section 11684, which in terms prohibits national banks from exercising any powers not authorized by any laws of the United States, can be said in any case to apply to national banks, the State courts are without power to enforce any penalties that may be provided by the State law under the decision in the case of *Farmers National Bank v. Dearing*, *supra*. Furthermore, under the principles laid down by this Court, in the absence of any Federal statute

authorizing the States to limit or control the operations of national banks, the Missouri statute under consideration is, as applied to national banks, a legal nullity, since it has been consistently held that such statutes have no application to national banks without the aid of a Federal statute making them applicable. (*Haseltine v. Central Bank of Springfield*, 183 U. S. 132; *Schuyler National Bank v. Gadsden*, 191 U. S. 451.)

From what has been said it necessarily follows that this statute can not be construed as vesting in the state courts the right to determine whether any business transacted by a national bank constitutes a violation of law. Such a construction would bring it in direct conflict with Section 5239, Revised Statutes of the United States, *supra*, which vests this power in the Comptroller of the Currency to be exercised by suit in a United States court.

SECTION 11737, MISSOURI REVISED STATUTES, 1910.

This section, which is likewise quoted by the lower court, provides in terms—

That no bank shall maintain in this State a branch bank or receive deposits or pay checks, except in its own banking house.

Under the decisions already referred to this State law can have no application to national banks in the absence of a Federal statute authorizing the State legislature to exercise this control over the operations of national banks. This proposition was fully considered in the case of *Farmers National Bank v.*

Dearing, supra. In that case, after quoting from *McCulloch v. Maryland* and *Osborn v. United States Bank, supra*, and after holding that national banks were instruments designed to be used to aid the government in the administration of an important branch of the public service, the court said (91 U. S. 33, 34):

They are a means appropriate to that end.
 * * * Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State can not give."

Decision of the Lower Court.

The decision of the lower court is predicated upon the assumption that the State statute which prohibits banks from operating branches does not impair the efficiency of national banks and does not conflict with any Federal statute.

From the reasoning of the court it would seem that if the National Bank Act in terms authorized national banks to operate branches, the State law prohibiting the operation of branches would have no application. But having first undertaken to construe the National Bank Act and to determine whether such law authorizes national banks to operate branches, the court, concluding that no

such authority exists, then holds that the State law prohibiting branches is not in conflict with any Federal statute and that the State has a right to apply this statute to national banks.

With deference I submit that this reasoning of the court is not only unconvincing but "begs the question." If it has inherent jurisdiction to determine what powers may be exercised by a national bank, or if it is vested with this jurisdiction by Congress, and in the exercise of this right the court finds that national banks have no power under the laws of their creation to establish and operate branches, it is immaterial whether the operation of such branches violates any State law. On the other hand, if the State courts are without jurisdiction to determine what powers may be exercised by national banks, the mere fact that the exercise of a given power may be inconsistent with a State statute does not give the court jurisdiction to determine what powers they may legally exercise.

The present status of this case illustrates what seems to be the fallacy of the position of the lower court on this point. The question now before the Court for reargument is not whether national banks are authorized by law to establish branches, but whether the lower court had jurisdiction to determine this question. If, however, the reasoning of the lower court is to be followed and its jurisdiction sustained on the ground that the establishment

of a branch by a national bank contravenes a State statute, it will be necessary for this Court first to determine that a national bank is without power to establish such a branch, since otherwise the State statute contravened will be in conflict with a Federal statute and hence of no effect.

In support of its position that the Missouri statutes here involved may be held to apply to national banks, the lower court relies primarily on the decisions of this court in the case of *Davis v. Elmira Savings Bank*, 161 U. S. 275, and *McClellan v. Chipman*, 164 U. S. 347. An analysis of these cases shows that neither is applicable to the case under consideration.

In *Davis v. Elmira Savings Bank* the question involved was one of conflict between the National Bank Act and a State statute. The National Bank Act directed the Comptroller of the Currency in winding up the affairs of an insolvent national bank "from time to time after full provision has been made for the refunding to the United States of any deficiency in redeeming the notes of such association * * *" to make a ratable dividend of the money paid over to him on all such claims as may have been proved. The New York statute directed the trustee, assignee, or receiver of "any bank or trust company which shall become insolvent to apply the assets received by him in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank but not to an amount exceeding that authorized" by law.

Mr. Justice White, delivering the opinion of the court, said (161 U. S. 283):

The question which the record presents is, does the law of the State of New York on which the savings bank relies conflict with the law of the United States upon which the Comptroller of the Currency rests to sustain his refusal? If there be no conflict, the two laws can coexist and be harmoniously enforced, but if the conflict arises the law of New York is, from the nature of things, in operative and void as against the dominant authority of the Federal statute.

The court held that there was a direct conflict and that the Federal statute was supreme.

In *McClellan v. Chipman*, a customer of a national bank to secure a preexisting debt had mortgaged real estate to the bank. A short time thereafter the debtor of the bank was adjudged to be insolvent under the insolvency laws of the State of Massachusetts. A Massachusetts statute provided in effect that if a person insolvent or in contemplation of insolvency made a conveyance of this sort for the purpose of preferring the creditor such a conveyance should be void.

Section 5137, Revised Statutes, U. S. (part of the National Bank Act), provides in part that—

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: * * *

Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

The court held that there was no conflict as between these two statutes, and the law of Massachusetts was held to apply.

There is no analogy between this and the case under consideration. In the *McClellan Case* the State statute made void a conveyance in fraud of creditors. The conveyance was made not by a national bank but by a customer of the national bank. In the instant case the statute in question purports to limit or restrict the operations of a Federal agency. It can not be reasonably contended that the decision in either of these cases is authority for the proposition that a State court may determine to what extent a national bank may exercise powers claimed under a Federal statute.

It is significant that the lower court, in discussing the question whether a Federal agency may be interfered with, confines its discussion to the possible effect on the national bank and holds that its decision does not impair the efficiency of a national bank. Does not this overlook the fact that in determining what powers may be exercised by a national bank the Missouri Court assumed powers vested by Congress in the Comptroller of the Currency and in the courts of the United States?

As we have already suggested, a different situation results where an act of Congress expressly authorizes a national bank to exercise a particular power when the exercise of such power is "not in contravention of state or local law." In such case the state court by *quo warranto* proceedings may assume jurisdic-

tion for the purpose of determining whether the exercise of the power in question contravenes any laws of the state. This question was fully considered by this court in the case of *First National Bank v. Fellows, Attorney General of Michigan*, 244 U. S. 416. In that case the constitutionality of a provision of the Federal Reserve Act was questioned which provided that—

The Federal Reserve Board shall be authorized and empowered * * * to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds.

A permit was granted to a national bank in Michigan and the Attorney General of the State instituted proceedings in the nature of *quo warranto* to test the right of a national bank to exercise this power. The Michigan Supreme Court held that the exercise of this power did not contravene the laws of Michigan but that the Act was unconstitutional. On appeal to this court the jurisdictional question was considered, and on this point the court, speaking through Mr. Chief Justice White, said (p. 427):

The question of the competency of the procedure and the right to administer the remedy sought, then remains. It involves a challenge of the right of the State Attorney General to resort in a state court to proceedings in the nature of *quo warranto* to test the power of

the corporation to exert the particular functions given by the act of Congress because they were inherently Federal in character, enjoyed by a Federal corporation and susceptible only of being directly tested in a Federal court. * * * But without inquiring into the merits of the doctrine upon which the proposition rests we think when the contention is tested by a consideration of the subject matter of this particular controversy it can not be sustained. In other words, we are of the opinion that as the particular functions in question by the express terms of the act of Congress were given only "when not in contravention of State or local law," *the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground.* (Italics ours.)

In the instant case there is no statute which authorizes the establishment of branches by national banks "when not in contravention of state or local law." In the absence of any such provision, a state law prohibiting the establishment of branch banks can have no application and the opinion of the Court in *Bank v. Fellows* is no authority for the proposition that the Attorney General of Missouri and the lower court have power to perform the functions specifically vested in the Comptroller of the Currency and in the courts of the United States.

II.

The Right to establish Branch Banks, or Offices.

As the Court has enlarged the scope of the argument to include the question of the right of a national bank to establish branches, it is incumbent upon the Department of Justice to state its views with reference to this much-vexed question, although I do not apprehend that the Court will find it necessary to consider this branch of the case in this proceeding, for the reasons heretofore given. In the practical operations of government bridges should not be prematurely crossed, either by the Executive or the Judiciary, and the right of a national bank to transact any of its business beyond its usual banking office can, I respectfully submit, be best determined, not as an abstraction or as a question of verbal definition, but if and when a concrete controversy arises between the Comptroller of the Currency, as the supervising director of the national bank system, and a national bank.

Nevertheless, as the Court may possibly prefer to dispose of the controversy, the views of the Department of Justice will be hereinafter stated. They are briefly summarized in a recent opinion of the Attorney General, which is printed as an Appendix to this brief.

The questions here involved may be stated as follows:

- (1) Has a national banking association the corporate power to establish and maintain a branch

bank for carrying on a general banking business in conjunction with the parent bank?

(2) If a national banking association has no such corporate power but nevertheless proceeds to establish and operate such a branch bank, what action, if any, may the Comptroller of the Currency take in the premises?

(3) Assuming that a national banking association is without power to establish and maintain a branch bank for carrying on a general banking business, has it the corporate power to open and operate an office or offices at a place or places other than its banking house for such routine services as the collection of deposits and cashing of checks for its customers?

(4) If a national banking association has the corporate power to open and operate such an office or offices, may the Comptroller of the Currency *by regulation or otherwise restrict or control* their location, their number, or the functions to be performed thereat?

In this connection it is necessary to consider the following provisions of the Federal Statutes:

Sec. 5133, Rev. Stat.:

Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five.

Sec. 5134, Rev. Stat.:

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state * * * *the place where* its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village. (Italics ours.)

Sec. 5136, Rev. Stat.:

Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power * * * to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such *incidental* powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits*; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title. (Italics ours.)

Sec. 5138, Rev. Stat. (as amended by Act of March 14, 1900, c. 45, sec. 10; 31 Stat. 48):

No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less

than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars.

Sec. 5155, Rev. Stat.:

It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

Sec. 5190, Rev. Stat.:

The *usual business* of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate. (*Italics ours.*)

Sec. 5239, Rev. Stat.:

If the directors of any national banking association shall knowingly violate, or know-

ingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Were this a case of first impression, there might be fair ground for argument whether, under Section 5134 of the Revised Statutes and Section 5190 of the Revised Statutes, it was intended to restrict a national bank in "its usual business" to "one banking house in any one place," thereby meaning the geographical locality, whether city, town, or village, in which the national bank has been located.

But this question does not now seem to be open to question. For over fifty years the Executive Department of the Government has consistently held, as a matter of administration, that the "usual business" of a banking association must be transacted in a single and well-defined banking building; and this administrative construction of the law has additional weight, not only because Congress has,

by supplemental legislation, acquiesced in it by passing laws which, in exceptional instances, authorized branch banks, but also because the agitation for the right to have branch banks has been carried on for many years, and, notwithstanding the vigorous attempt to secure legislation which would permit branch banks, Congress has heretofore refused to authorize such branches.

The Attorney General, in an opinion dated May 11, 1911 (29 Op. Atty. Gen. 81), summarizes these conclusions of both the Executive and Legislative branches of the Government as follows (p. 98):

First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or coordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and

Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

One of the arguments which the Attorney General made against the authority of a national bank to establish a branch bank was the fact of the enactment by Congress on March 3, 1865 (Sec. 5155, Rev. Stat.), subsequent to the enactment of the National Bank Act, of the provision authorizing a State bank having branches to retain such branches after having been converted into a national banking association. He

contended that this legislation would have been unnecessary if a national bank already had the power to establish a branch. This section as here quoted below has a further bearing upon the definition of a branch bank.

Section 5155, Rev. Stat.:

It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

A branch bank, therefore, as the term is used in the National Bank Act, by the Attorney General, and by the office of the Comptroller of the Currency, is an institution partaking of the nature of a primary organization. To it may be allocated a proportionate share of the capital stock and the extent of its business is governed by the amount of such allocation. It has an organized personnel. In the officers at the branch there is vested the same character of authority, responsibility, and discretion as is vested in the officers at the parent bank. In so far as its practical operations are concerned, it is a complete substitute for a local bank in the locality

which it serves. It engages in a general banking business in conjunction with and subordination to, the parent bank. Practically a branch bank is in many respects a partly autonomous unit separately housed in its own banking house. It is to many intents and purposes an additional bank under the same board of directors, closely associated with the parent bank, but operating in most matters independently.

Considering Section 5190, Revised Statutes, in the light of the above definition, the "banking house" is the legal domicile of the bank from which its discretionary powers are exercised and in which its policies are formulated and approved. If a national banking association established a branch bank or banks it would be transacting its banking business at more than one banking house. It would in effect be operating more than one bank. This power to multiply banking offices the law as interpreted for many years has consistently denied, and the refusal of Congress to authorize branch banking, as generally allowed in England and France, leaves no doubt as to the policy of the law.

If, therefore, a national bank should attempt to establish and operate a branch bank, such action could be treated by the Comptroller as a violation of Section 5190, Revised Statutes. His remedy would be to invoke Section 5239, Revised Statutes, by bringing suit in his own name for forfeiture of charter of the bank.

But the question still remains, can a national bank transact in this age of the telephone and telegraph no business whatever beyond the four walls of its office building? Is it "cribbed, cabined, and confined" to one small place? May it not have "service stations" for minor and routine purposes? If the answer is "No," how can it clear its checks in the Clearing House? The answer is to apply the rule of reason, which governs all legislation expressed with the limitations of language.

The words "the usual business" as used in this section can not be given a strictly literal interpretation. It was never intended by the National Bank Act that all of the business of a national banking association should be conducted within the four walls of a single building. Much of the routine business of every bank must be transacted away from the banking house. This has always been the case, although the character of business so conducted has changed from time to time to meet the changing economic and social conditions and the consequent development of banking practice. The business of banking, like every other established human enterprise, is continually in process of growth and adjustment.

This portion of Section 5190, Revised Statutes, must, therefore, be construed in connection with that portion of Section 5136, Revised Statutes, which provides that the board of directors of a national banking association may exercise all such incidental powers as shall be necessary to carry on the busi-

ness of banking. It has been found necessary for the banks to transact some of their business on the outside of their banking houses. Must they do so on the open highway or on the curb? May they not have an office or building? For the purpose of illustration, a few examples may be mentioned.

National banking associations in the larger cities are members of clearing-house associations, an organization through which considerable routine banking business is transacted. The representatives or agents of the national banks go to these clearing houses each day for the purpose of clearing checks which they hold upon other banks. National banks also have correspondent banks in various cities to whom and from whom exchanges, remittances, and collections are sent and received; the national banks thus receive and pay out money at places other than their banking houses. National banks participate in syndicate loans made at a place other than their banking houses. They also have agents to travel to represent the bank in an advertising capacity or in soliciting business. National banks may also have efficiency experts whose duties take them to various places in order that they may obtain first-hand information as to the management and appraisal of the business of various manufacturing plants or of other corporations who have, or are applicants for, loans. National banks, upon occasion, send agents out to inspect farms as a basis for real-estate loans and to collect rents in towns and cities. National banks also send agents to public sales in which they are interested;

they sometimes send agents to county seats to bid in property being sold at auction which they hold as security. They frequently send out their notary public to take acknowledgments, to write deeds, mortgages, etc., where the makers are unable to visit the bank. National banks employ attorneys to represent them in legal transactions and proceedings outside of their banking houses. National banks redeem their circulating notes in the Treasury at Washington. The messengers of national banks are sent out from the banking houses on errands as business may require.

It has never been contended that national banks in conducting business of the character above enumerated violate Section 5190, Revised Statutes, because the business was carried on at places other than their banking houses. In the light of modern banking practice a narrow and literal construction of this section is unworkable. The construction must be made with the practical situation in mind.

In this connection it is pertinent to quote from the opinion of the Supreme Court in *Merchants Bank v. State Bank* (10 Wall., 604, 651):

The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have

been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy and inseparable from it. There is no force in this objection.

This construction of Section 5190, Revised Statutes, by this Court has an added significance in view of the fact that the transactions involved in this suit took place in 1867, only three years after the approval of the National Bank Act.

The exercise of powers, like those above mentioned, are clearly incidental powers of a national bank. In his opinion of 1911, the Attorney General drew a sharp distinction between the powers of a branch bank and the exercise of such incidental powers by a national bank. After citing *Bank of Augusta v. Earle* (13 Pet. 519), *Tombigbee Railroad Co. v. Kneeland* (4 How. 16), *City Bank of Columbus v. Beach* (Fed. Case No. 2736), the Attorney General said (29 Op. 86):

Many cases might also be cited wherein it has been held that banking corporations have the power to establish clearing-house agencies.

These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business.

And further (Op. 87, 88):

These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.

That such a distinction does exist in fact is obvious.

An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution.

And again (Op. 91, 92):

As said in *First National Bank v. National Exchange Bank*, 92 U. S. 122, 127, in referring to Section 5136, Revised Statutes:

"Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently." Yet the power to establish a branch bank is certainly in no respect essential to the discounting and negotiating of promissory notes,

drafts, bills of exchange, and other evidences of debt, or of exercising either or any of the incidental powers named in the statute, or of any power which is incident to the carrying on of a general banking business.

The operations of a national banking association may be divided into two general classes:

(a) Those which must be performed by the board of directors; and

(b) Those which must be delegated to and performed by the officers, agents, or servants of the bank.

These powers may be again divided into those which require discretion, judgment, and banking experience, and those which are ministerial, clerical, and of routine character.

The powers performed by the board of directors may be described as discretionary powers, while those performed by officers, agents, or servants may be referred to as ministerial powers.

The revenues of a bank are derived primarily from (1) the investment of its funds, which consist of its capital stock subscriptions, surplus or accumulated profits, and its deposits; (2) loan of its credit in the form of acceptances; and (3) fees and commissions received in the exercise of fiduciary powers.

In the exercise of these powers full responsibility rests upon the board of directors of the association to see that the restrictions and limitations of the National Bank Act are fully complied with. The responsibility of supervising all such transactions is

vested in the board and this responsibility can not be evaded by delegation of these powers.

To illustrate: If a national bank makes a loan in excess of the amount permitted by Section 5200, Revised Statutes, or in any other respect violates the provisions of the National Bank Act, under Section 5239, Revised Statutes, "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation." This section specifically provides that—

If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all of the rights, privileges, and franchises of the association shall be thereby forfeited.

It will be observed that under the terms of the National Bank Act all of the powers of the national bank are vested in its board of directors, and the board is authorized, *inter alia*, to appoint officers and agents, to remove them at will, to fix their compensation, and to adopt by-laws for the general conduct of the banking business. The responsibility for the management and control of the affairs of the bank is, therefore, definitely vested in the board of directors, and the services performed by officers or agents must be performed under the direction of and by delegation of authority from

the board of directors. This being true the discretionary powers of the board can not be delegated and must, therefore, be exercised only at the banking house.

On the other hand, the actual receipts of deposits, payment or certification of checks, the actual payment of money on loans authorized by the board, and other purely ministerial acts of necessity must be performed by officers or agents.

These acts, while usually performed by officers or agents at the banking house, are sometimes necessarily performed by correspondents or agents elsewhere. Money deposited at the banking house is received by the receiving teller, an agent or employee of the bank. Money received in payment of checks, drafts, or other items collected by the bank is received by correspondents or agents of the bank elsewhere than at the banking house. The receiving teller and the correspondent bank are both agents of the bank. In an age, which has defied space, all business can not be restricted to one place.

It reasonably follows that if a national bank has the incidental power to perform these administrative functions through its agents or servants, acting when necessary outside of its banking house, the bank may also, *if necessary*, maintain an office or offices—as distinguished from a branch—at a place other than its banking house. Such offices are service stations, or minor facilities, necessitated by the conditions of our highly complex civilization.

When does the exercise of an incidental power by a national bank become reasonably necessary? The answer to this question involves a consideration of the conduct of the banking business at any given time and place.

It is quite clear that a national bank receives deposits and cashes checks through the exercise of its incidental powers under the National Bank Act. It is, perhaps, the simplest and oldest form of banking service. It involves little discretion. It is almost wholly clerical. In the past national banks have been able to render for its customers in the city in which they were located this service almost exclusively within the four walls of its banking house. But they now face new conditions. For example, the rapid growth of modern city populations in recent years has resulted in congestion of traffic in the downtown districts and in the development of residential sections at remote distances from the banks. The extensive use of the automobile as a means of transportation by individuals has been a large factor in creating these conditions. To accommodate distant customers the need is strongly felt in many localities for the banks to maintain an office or offices at some distance from their banking houses for the purpose of receiving deposits and cashing checks.

This situation has been met in about one-half of the States through legislation or rules and regulations by means of which the State banks are permitted thus to extend their services beyond the four

walls of their banking houses. A new development in banking practice has thus been instituted in a number of cities by the State banks, and it is not unreasonably claimed by many national banks, especially in the large cities, that a similar privilege should be given them to permit competition. The necessity is in the economic situation, while the immediate and practical necessity is due to the new banking practice by the State banks. The national banks must be allowed to compete or suffer a serious loss in business and prestige. Did Congress contemplate a policy of unreasonable restriction, which might undermine the national banking system in the large centers of population?

III.

The Authority of the Comptroller.

I come now to the question of the authority of the Comptroller, by regulation or otherwise, to supervise within reasonable limits the location of, the number of, or the functions to be performed at such office or offices.

In *Studebaker v. Perry* (184 U. S. 258), where his authority to make more than one assessment upon the shareholders of a national banking association was brought into question, the Court said (p. 262):

The logic of the plaintiff in error requires him to convince us that his voluntary payment of one assessment, made when the Comptroller was imperfectly acquainted with the amount of the bank's indebtedness, amounts

to a satisfaction *in toto* of his obligation. Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language. The inconveniences that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

Let me briefly summarize the principal powers and duties given to the Comptroller of the Currency by the National Bank Act as amended. The Comptroller is charged by the Act with the execution of all laws relating to the issue and regulation of the national currency; he must approve the name of each association, and no association can commence the business of banking without authorization from him; he may make rules and regulations under which certain national banks may act as fire or life insurance agents; national banks operating foreign branches are required to furnish him, upon demand, information as to the condition of such branches; he is required to approve the change of the name of a national bank or the change of its location to another place in the same state; he approves increases and decreases of capital stock; in case of a deficiency of 20 per cent or more in the surplus of a national bank, he may compel the bank to close its doors; he approves the conversion of State into

national banks; he notifies national banks of the impairment of capital stock; regular (and special, if required) reports of condition must be made to him by all national banks, also reports of dividends; reports of voluntary liquidation must be made to him; he is required to approve the consolidation of national banks; when he becomes satisfied of the insolvency of a national bank he may forthwith appoint a receiver who shall under his supervision wind up the affairs of the bank; he appoints examiners who are required to examine each national bank at least twice each year and to report their findings to him; he may in his discretion require special examinations.

It will readily be seen from the above that the specific supervisory control of the Comptroller over the national banking system covers a wide field, and requires for its effective exercise a very broad discretion.

On this point the Supreme Court in *Cook County Nat. Bank v. United States* (107 U. S. 445, 448) said:

We consider that act [the National Bank Act] as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their

notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

While the Comptroller may no doubt, as an incident to some of the above-enumerated powers, exercise a measure of control over the establishment of such offices or agencies, his authority in this respect rests upon a much broader basis. He is authorized by Section 5239, Revised Statutes, to bring suit for the forfeiture of the charter of any national banking association whenever, in his judgment, it has violated any of the provisions of the National Bank Act. This provision of itself establishes the position of the Comptroller of the Currency as the practical administrator of the National Bank Act. It is the intent of this provision, construed in connection with the other provisions of the act, that the Comptroller should at all times maintain a watchful supervision over the national banks for the purpose of seeing that they conduct their business within the requirements of the law. This power is emphasized by the further fact

that a national bank has no powers except those derived from the national banking laws.

For the past fifty-nine years, in the practical administration of the national banks, the Comptroller has attained a position in which his authority of general supervision over the national banks is well recognized. This power may not in all respects be specifically given by the express language of statutory enactment, but has as a logical consequence and as an inevitable implication grown out of the exercise of various statutory responsibilities and duties imposed upon him and especially from his general authority to bring suit for forfeiture of charter against any national bank which, in his judgment, may be in violation of the National Bank Act.

In the Agricultural Credits Act of 1923 (c. 252, sec. 209 (a), 42 Stat. 1467) Congress clearly recognized and affirmed this status of the Comptroller by the following language:

The Comptroller of the Currency shall exercise the same *general power of supervision* over such corporations as he *now exercises over national banks* organized under the laws of the United States.

While it is not contended that the Comptroller could cite this new language as authority for unlimited, much less arbitrary, supervision over the national banks, nevertheless it clearly indicates that the general supervision which he has heretofore exercised and now exercises over the national banks,

as a practical outgrowth of the administration of the National Bank Act, has been a legal exercise of his discretionary authority.

This case does not require the Department of Justice to express any opinion as to whether the establishment of branch offices rests wholly in a given case in the discretion of the Comptroller of the Currency. He unquestionably has a supervisory power to see that the bank does not exceed its powers in transacting its "usual business" beyond the walls of its main office. Presumptively all its "usual business" must be transacted in such main office. No bank can transact any business beyond its main office unless in the conditions of the banking business there is plainly a justification therefor, and, *a fortiori*, it can not maintain a branch office unless there is the same clear warrant. The Comptroller of the Currency, in the exercise of his supervisory power to keep the operations of national banks within their charter powers, clearly has the right to determine, from investigation and otherwise, whether a national bank is maintaining a "branch bank" as distinguished from a "branch office," and, if satisfied that the outside business office is essentially a "branch bank," he is authorized to proceed in the courts of law to require such bank to abandon its branch under the penalty of a forfeiture of its charter.

This administrative power, however, does not necessarily imply a discretionary power on the part of the

Comptroller to permit one bank to have a branch office and to deny it to another, or to permit one locality to have branch offices and to deny them to another. If, as I have argued, a national bank may conduct its minor and routine operations, when necessary, beyond the walls of its place of business, it may be a right which the bank has as a part of its charter and not dependent upon any discretionary permission of the Comptroller. It is not necessary in this case or in this brief to discuss this grave question of power. The reference is only made to exclude any implication that it is the opinion of the Department of Justice that the Comptroller of the Currency may finally decide in the case of each bank whether he will or will not permit it to have a branch office. In this connection it is significant that the question of excesses of corporate power is to be determined in a judicial proceeding instituted by the Comptroller.

In any event the Comptroller of the Currency, in his duty of compelling national banks to act within their corporate powers, has supervisory discretion; and this important duty emphasizes again the first point of our brief, upon which the Government mainly relies, that a State may not, in a *quo warranto* proceeding, interfere with the exercise of such discretion. If the State of Missouri may, in this proceeding, call the First National Bank in St. Louis to account for transacting its business beyond the walls of its main office, then the Attorney General of every State has a like privilege. It would follow that the

whole national banking system could be thrown into confusion by the divided counsels of Federal and State authorities. That which the Comptroller of the Currency might regard as reasonably within the charter powers of a national bank might be regarded by the Attorney General of a State as in excess of such powers.

Our system of Government does not contemplate such a confusion of authority. If the First National Bank in St. Louis, whose incorporation by the Federal Government is undisputed, has exceeded its charter powers by maintaining branch banks, the question then concerns the Federal Government—the sovereign which created the Bank. Primarily, the restriction of the Bank to its charter powers is, as a question of administration, between the Comptroller of the Currency and the Bank, and if the question can not thus be adjusted in the practical workings of the Government, then it becomes a question for the Federal Judiciary, in a suit properly brought by the Comptroller of the Currency, to determine whether the Bank has acted in excess of the powers granted to it by the Federal Government.

For these reasons the judgment of the court below should be reversed and this suit should be dismissed.

Respectfully, ✓

JAMES M. BECK,
Solicitor General.

✓ GEORGE ROSS HULL,
✓ CHARLES W. COLLINS,

Of Counsel.

OCTOBER, 1923.

APPENDIX.

OPINION OF ATTORNEY GENERAL.

DEPARTMENT OF JUSTICE,

Washington, October 3, 1923.

SIR: I have your letter of August 30, 1923, requesting my opinion on the power of national banking associations to open and operate offices at places other than their banking houses for the performance of such routine services as the receipt of deposits and cashing of checks for their customers. You request to be advised whether:

(1) Assuming that a national banking association is without power to establish and maintain a branch bank for carrying on a general banking business, has it the corporate power to open and operate an office or offices at a place or places other than its banking house, for the performance of such routine services as the collection of deposits and cashing of checks for its customers?

(2) If a national banking association has the corporate power to open and operate such an office or offices, must they be located within the city limits of the place designated in the organization certificate of the association as the place where its operations of discount and deposit would be carried on?

The statutes relating to national banking associations, so far as they are material to our present inquiry, are Sections 5133, 5134 (Par. 2), 5136 (Pars. 6 and 7), and 5190, R. S. The material parts of said statutes read as follows:

"SEC. 5133. Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which

the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs."

"Sec. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

* * * * *

Second. The place where its operation of discount and deposit are to be carried on, designating the State, Territory or district, and the particular county and city, town or village.

Sec. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which the stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of this Title.

"Sec. 5190. The usual business of such national banking associations shall be transacted at an office or banking house located in the place specified in its organization certificate."

The provisions of Section 5190 R. S., as to the place at which the usual business of the bank shall be transacted refers to the city or town in which the bank is located and not the particular place within the city. *McCormick v. Market Nat'l Bank*, 165 U. S. 538, 549.

National banks have only those powers specified in the National Banking Acts, and such other powers as are necessarily incidental thereto. *McBoyle v. Union Nat'l Bank*, 122 Pa. 458; *First Nat'l Bank v. Nat'l Exchange Bank*, 92 U. S. 122, 127; *Logan Co. Nat'l Bank v. Townsend*, 139 U. S. 67, 73; *Bullard v. Bank*, 18 Wall. 589, 593.

In *Bullard v. Bank*, supra, the Supreme Court said:

"The extent of the powers of national banking associations is to be measured by the Act of Congress under which such associations are organized."

In *Logan Co. Nat'l Bank v. Townsend*, supra, the Court said:

"It is undoubtedly true, as contended by the defendant, that the National Banking Act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

It is to be observed that Section 5190, R. S., relates to the "usual business" which, in my opinion, is to be construed the general banking business usually conducted by national banks. There is no

statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the association.

In my opinion, a national banking association may establish in the city or place designated in its certificate of organization an office or offices for the transaction of business of a routine character, which does not require the exercise of discretion, and which may be legally transacted by the bank itself. It may not, however, establish a branch bank to do a general banking business such as is usually done by national banks. The establishment of such a branch would be illegal and subject the offending bank to the forfeiture of its charter. 29 Op. 81.

It seems to be the intent of the National Banking Act that the business of banking ordinarily transacted by a national banking association shall be performed in the city or place designated in its organization certificate.

It has been held that a national bank cannot make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank. *Armstrong v. Second Nat'l Bank*, 38 Fed. 883, 886.

While national banking associations may exercise all the powers expressly given them by the statute, and such additional powers as may be necessary to carry on the business of banking, the manner in which the powers may be exercised are subject to the supervision of the Comptroller of the Currency. Should the Comptroller, in the exercise of his supervisory powers over national banks, ascertain that the directors or officers have knowingly violated, or are violating, the national banking laws, he may proceed against such association, its

officers and directors as provided by Section 5239, R. S., which reads as follows:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Answering your specific questions I have the honor to advise you as follows:

First. National banking associations have the power to open and operate offices at places other than their banking houses, within the place specified in their organization certificate, for the performance of such routine services as the receipt of deposits and the cashing of checks for their customers.

Second. National banking associations have no authority to open offices for the purpose of receiving deposits, paying checks, etc., outside of the limits of the city or place designated in the organization certificate as the place of its operations of discount and deposit.

Respectfully,

H. M. DAUGHERTY,
Attorney General.

The Honorable,

The SECRETARY OF THE TREASURY.

FILED
OCT 22 1923

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK OF ST. LOUIS,
Plaintiff in Error
(And Petitioner for Certiorari),
v.

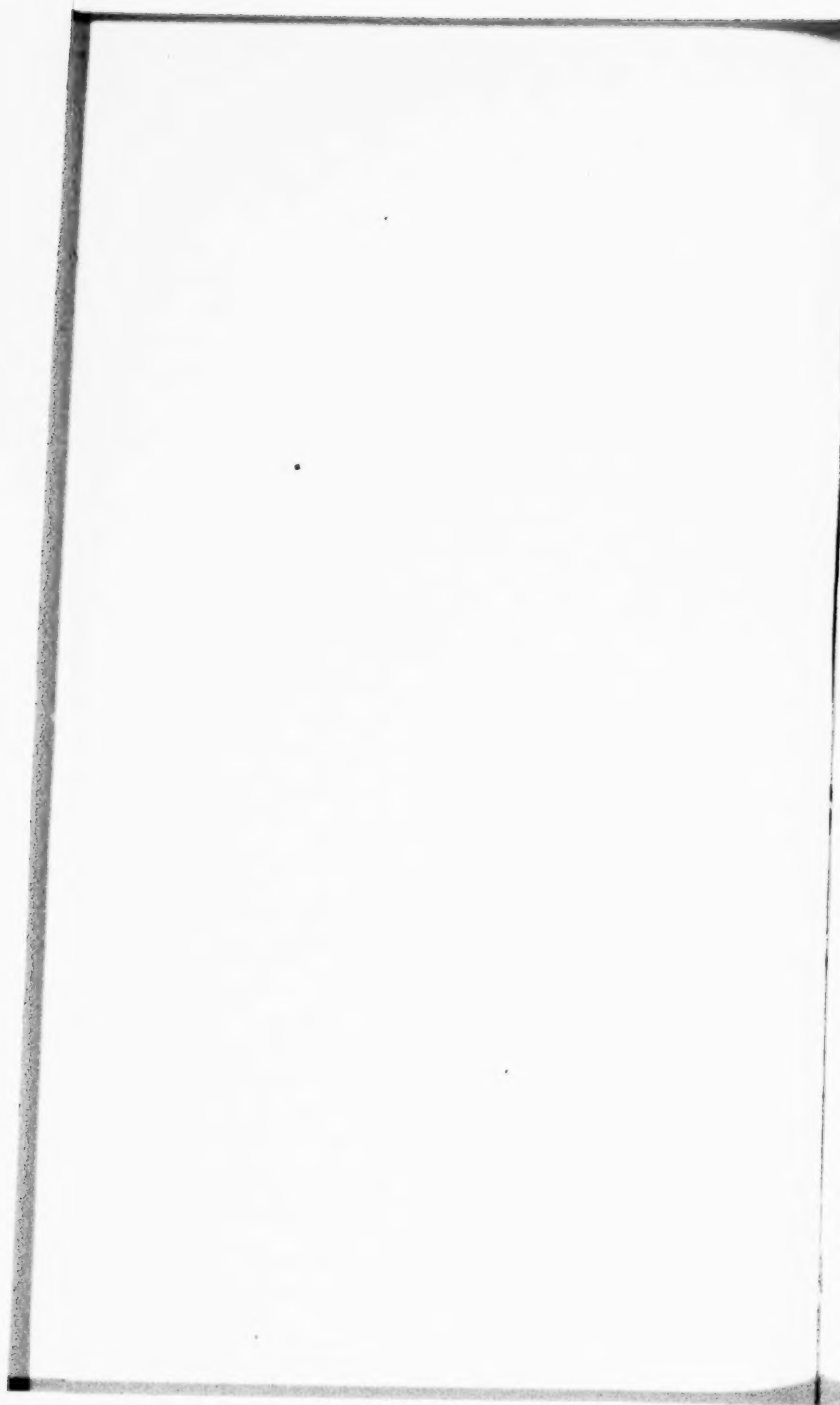
STATE OF MISSOURI, at the Information of
JESSE W. BARRETT, Attorney-General,
Defendant in Error
(And Respondent for Certiorari).

No. 252.

On Writ of Error and Petition for Writ of Certiorari to the
Supreme Court of Missouri.

**MOTION OF THE STATES OF WISCONSIN,
MINNESOTA, INDIANA, IOWA AND ILLI-
NOIS FOR LEAVE TO FILE BRIEF AND
SUBMIT ORAL ARGUMENT UPON THE
HEARING OF THE CAUSE.**

HERMAN L. EKERN,
Attorney-General of the State of Wisconsin.
CLIFFORD L. HILTON,
Attorney-General of the State of Minnesota.
ULYSSES S. LESH,
Attorney-General of the State of Indiana.
BENJAMIN J. GIBSON,
Attorney-General of the State of Iowa.
EDWARD J. BRUNDAGE,
Attorney-General of the State of Illinois.



IN THE
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Come now the States of Wisconsin, Minnesota, Indiana, Iowa and Illinois, by their respective Attorneys-General, and move the Court that they may submit both oral argument and brief upon the hearing of this cause on their behalf, and in support of the motion state to the Court:

First. That the legislation of their respective states is adverse to the establishment, maintenance or operation of branch banks within their limits, and unless a state is permitted to vindicate and enforce its laws against such usurpation as is set forth in the information herein, like usurpations upon their authority will be attempted and they will be without remedy

for the wrongs suffered by them from such usurpation.

Second. That national banks, as agencies of the Federal Government, have no authority under the law of their creation to establish, maintain or operate branch banks, and that the establishment, maintenance or operation of branch banks by national banks is an infraction of the laws of the states which the respective states may prevent, abate or redress by due and appropriate process or proceeding initiated in its own courts.

Notice of this motion has been served on counsel for both parties to this cause and on the Solicitor-General of the United States.

Herman L. Ekern
Attorney-General of the State of
Wisconsin.

Clifford L. Hilton
Attorney-General of the State of
Minnesota.

Ulysses S. Lesh
Attorney-General of the State of
Indiana.

Benjamin J. Gibson
Attorney-General of the State of
Iowa.

Edward J. Brundage
Attorney-General of the State of
Illinois.

NOV 8

IN THE
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OCTOBER TERM, 1923.

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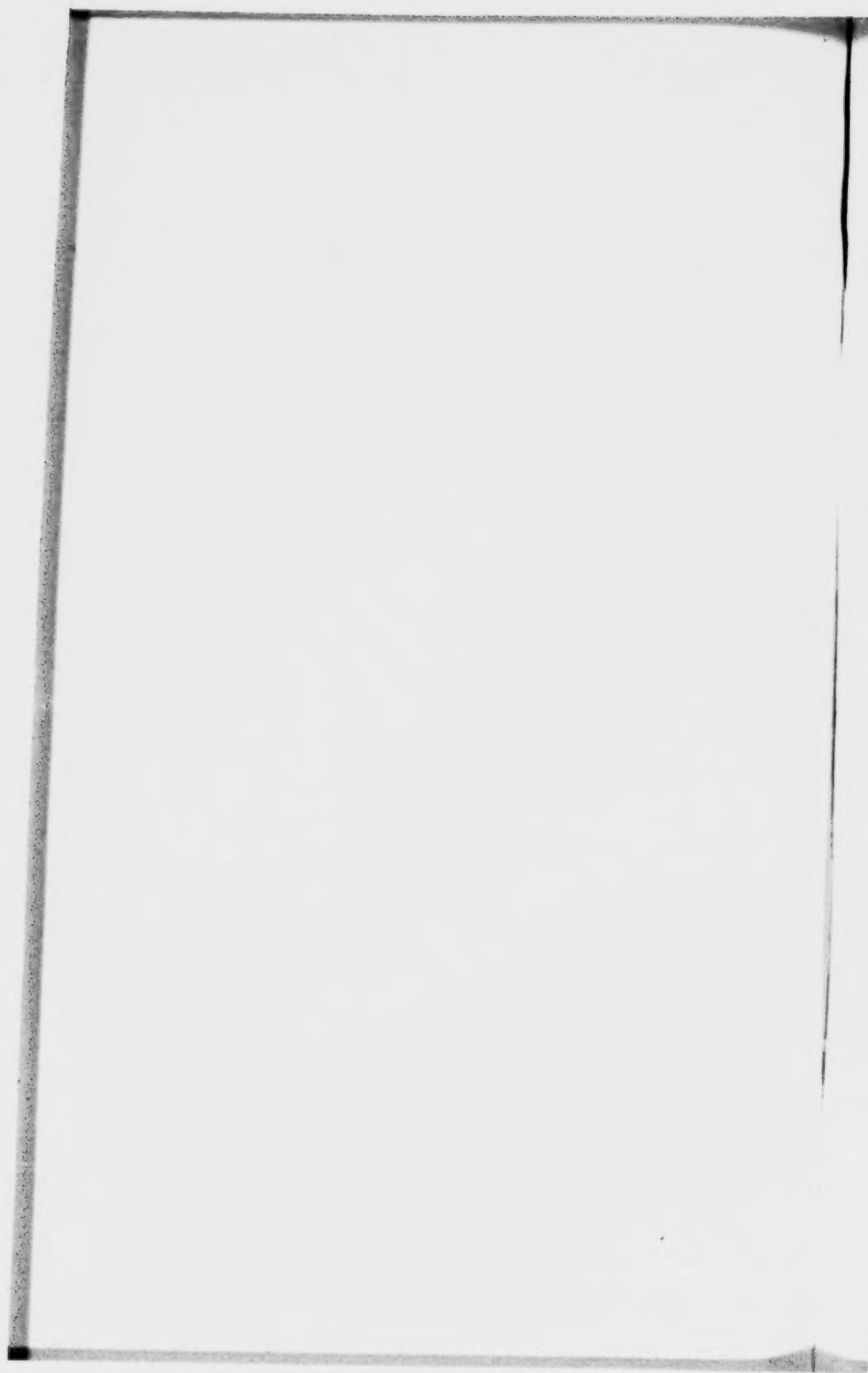
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On Writ of Error and Petition for Writ of Certiorari to the
Supreme Court of Missouri.

BRIEF ON BEHALF OF THE STATES.

HERMAN L. EKERN,
Attorney-General of the State of Wisconsin.
CLIFFORD L. HILTON,
Attorney-General of the State of Minnesota.
ULYSSES S. LESH,
Attorney-General of the State of Indiana.
BENJAMIN J. GIBSON,
Attorney-General of the State of Iowa.
EDWARD J. BRUNDAGE,
Attorney-General of the State of Illinois.
H. H. CLUFF,
Attorney-General of the State of Utah.
MILTON J. HELMICK,
Attorney-General of the State of New Mexico.
GEORGE F. SHAFER,
Attorney-General of the State of North Dakota.
J. S. UTLEY,
Attorney-General of the State of Arkansas.
O. S. STILLMAN,
Attorney-General of the State of Nebraska.
CHARLES B. GRIFFITH,
Attorney-General of the State of Kansas.
FRANK E. HEALY,
Attorney-General of the State of Connecticut.
DAVID J. HOWELL,
Attorney-General of the State of Wyoming.
E. T. ENGLAND,
Attorney-General of the State of West Virginia.
THOMAS B. MCGREGOR,
Attorney-General of the State of Kentucky.
GEORGE T. SHORT,
Attorney-General of the State of Oklahoma.
BUELL F. JONES,
Attorney-General of the State of South Dakota.
JOHN H. DUNBAR,
Attorney-General of the State of Washington.



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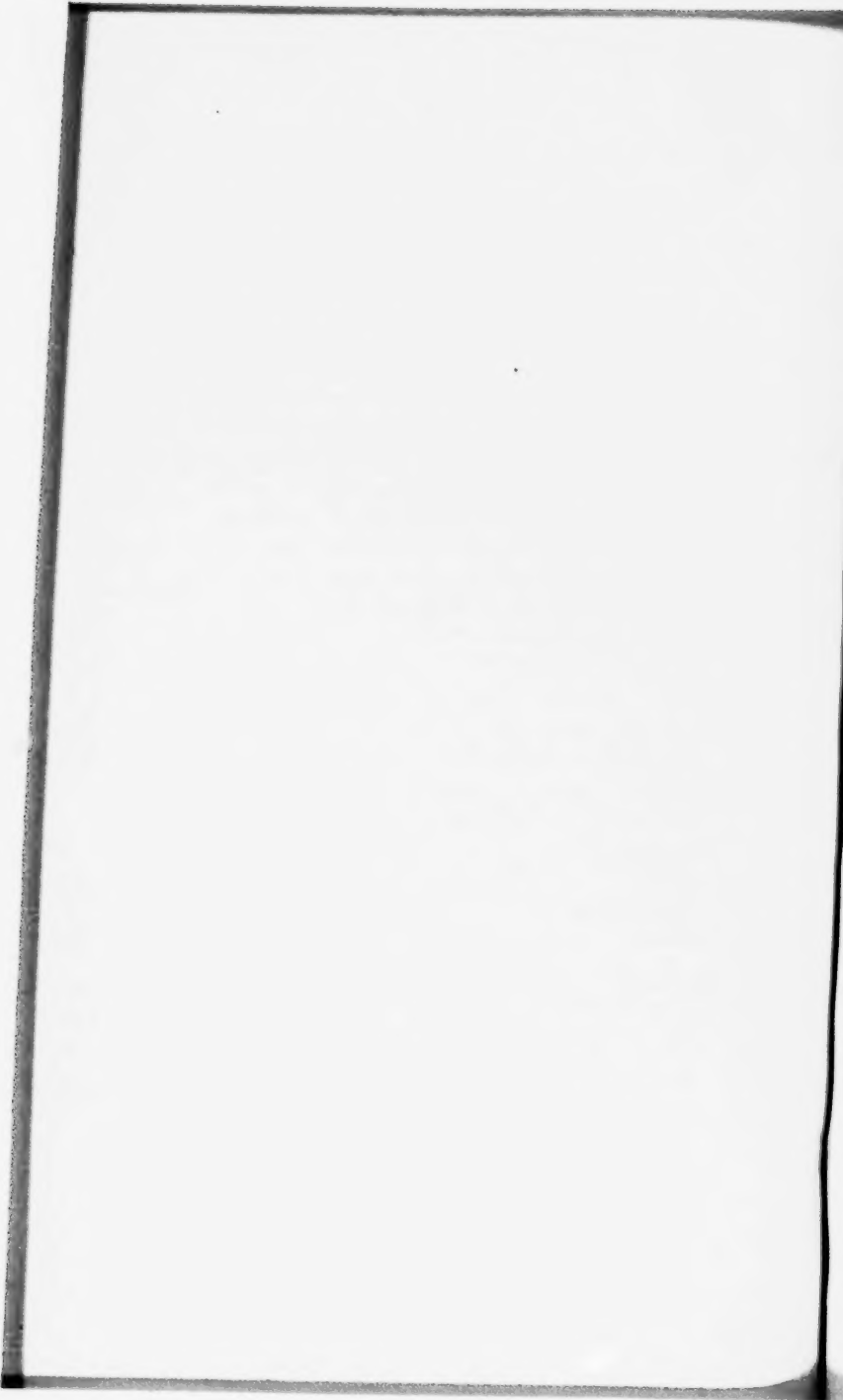
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IN THE
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BRIEF ON BEHALF OF THE STATES.

STATEMENT.

With the permission of the Court, the States of Wisconsin, Minnesota, Indiana, Iowa, Illinois, Utah, New Mexico, North Dakota, Arkansas, Nebraska, Kansas, Connecticut, Wyoming, West Virginia and Kentucky file this brief in aid of the defendant in error.

The interest which these states, in conjunction with a number of others, have in the proper determination of this cause is apparent from the fact that their respective state-wide banking systems consist solely of a large number of individual, separate and

locally owned institutions possessing no branches or outside offices for the reception of deposits, payment of checks or for other business.

Most of these states have by statutes of long standing prohibited branch banking, and such of them as have not enacted prohibitive statutes have respected the policy and law of the Federal Government in its attitude upon the subject by withholding from their system the business of branch banking or by enacting no law for the establishment, regulation or supervision of banks of that character.

From the year (1863) of the establishment of our present national banking system by act of Congress, these states have strictly adhered to the mandate of the federal law. By withholding this power from their own institutions they have protected the national banking associations from the destructive, centralizing and monopolistic effect of a branch banking system. In keeping with this more wholesome policy, and recognizing the inability of national banks to operate branches or branch offices in the city, town or village of their domicile, they, too, during these many years, have so confined their own banks, thereby enabling state and national institutions to operate in the same competitive atmosphere.

To permit an infraction of either the state or national law in this respect would of necessity break down, cripple and perhaps destroy both systems—

state and national—and in a large measure disturb the commercial, industrial and financial activities of the people of the respective states.

For the period of almost sixty years immediately following the enactment of our present national system the Comptroller of the Currency has studiously and faithfully administered the national law in strict accord with legislative intent and policy.

In the early part of 1922 the president of plaintiff in error, at the State Bankers Association of Missouri, announced the intention of that bank to commit the infraction complained of, and on June 15th of that year the branch bank was opened and the unlawful act committed. This announcement and the report of the opening of the branch immediately became a matter of profound national and state concern—of great public concern. Immediately following this bold and defiant act, the question found its way into the active pages of the catalogue of current events or current history; it became the subject of condemnatory resolution by groups and conventions of bankers, business men and political parties, and while all this has been going on, the Comptroller, at all times fully aware of the fact, has failed to act or take any steps to suppress the wrong thus committed, though stating publicly and through official bulletins that he had not and would not issue permits for such conduct. In a word, he has denied the right of plaintiff in error to

establish and operate the branch bank, but has not acted and still fails to enforce the law thus violated.

And now comes the Federal Government, through its Solicitor-General, appearing in this cause, asserting that the states are without authority in their own names to prosecute suits to abate the wrong or stay the arm of a federal agent in the commission of an act not authorized by federal law and which, if allowed, will occasion irreparable injury to the public welfare and general good of the people of the states, and that the Federal Government alone is clothed with authority to sue, and then only as directed by the Comptroller of the Currency. In other words, that the offended states must stand as idle sovereignties and allow their own financial creatures to suffer until the Comptroller of the Currency, a mere ministerial officer or agent of the Federal Union, chooses to act. He may never challenge the unlawful conduct. Therefore, must the sovereign states be compelled to yield to such conduct? Have they, through the Federal Constitution, surrendered so completely their sovereignty as to be unable to abate, stop, or restrain conduct of men and corporations which is injurious to the common good and the welfare of their people when the conduct complained of has not received the sanction of federal law—is inhibited by it—but is claimed by the offender to be authorized under it?

The laws of Congress are the laws of the land. The states cannot ignore or abate them. They must obey, and as we have always understood, may enforce them when enforcement is found essential in the preservation of the society of the states and personal and property rights thereunder. If, therefore, a federal law is being violated by a federal agent or agency, or the federal agent or agency be acting beyond the powers conferred by national authority, and such unlawful conduct be at the same time in contravention of state law or detrimental to its general good, has not the state, as a separate and distinct sovereignty, yielding only to the paramount authority of the Federal Constitution and laws, the full right, concurrent with federal procedure, to protect its own sovereignty and its people against the ravages of such unlawful conduct through any judicial procedure deemed by it appropriate within the due-process clause of the Federal Constitution?

We do not understand that the state claims the right to punish under the federal laws for a violation thereof, but we do understand that the state has a perfect right to protect itself against the onslaught of federal agents not authorized by federal law when such conduct tramples upon the state sovereignty or is in contravention of its law. It may restrain, abate or stop such unlawful conduct by any judicial order, process or proceedings deemed essential and proper

by it, such procedure to be of such orderly character as is usually adopted by the state in the enforcement of its rights, with the full realization that its decision is subject upon writ of error to review by this court upon all questions involving rights under the Federal Constitution or federal laws.

Realizing the necessity of protecting the respective state banking systems against an invasion like unto the present case, and being convinced of the right and power and duty of the states to proceed in such event, we submit the following in justification of such right and power as relating to the subject matter of this cause.

ARGUMENT.

I.

There Is No Federal Authority for Branch Banking.

Under the general law of Congress as originally enacted in 1863, branch banking is not recognized or permitted. While the act contains no positive words of inhibition, it nevertheless confines the business operations of a national bank to "an (one) office or (one) banking house located in the place specified in its organization certificate" (Sec. 5190, U. S. R. S.), and requires the application certificate of each bank (which application certificate must be executed and filed with the Comptroller of the Currency in order that the individuals forming the organization may become a national banking association) to specifically state "the place where its operations of discount and deposit are to be carried on, designating the state, territory or district and the particular county, town or village" (Sec. 5134, U. S. R. S.).

The above legislative exactions without question so restricts the operations to a single location as to necessarily preclude the maintenance and operation of branches. By apt words, and in a single sentence, there is enacted a restricted grant of authority. By the words used, the bank must carry on its operations at a place in a "designated" state and "particular

county, town or village," and must transact its business "at an office or banking house located in the place specified." These words necessarily impel the exclusion of authority to operate at more than one office or one banking house in the designated state or particular county, town or village, or elsewhere.

Since 1863 Congress has enacted much legislation upon the subject of banks, but has made no change in the provisions of Sections 5134 and 5190, U. S. R. S., above referred to.

The defendant in error claims the right to establish branch banks by virtue of its incidental or implied powers. This we deny. Congress has never considered it as either essential or advisable. In only three instances has Congress recognized the advisability of authorizing branch banks, i. e., within the World's Fair grounds at Chicago and St. Louis, respectively, and in the conversion statute (Sec. 5155, U. S. R. S.). In each instance the substantial reason for the authority is most apparent. Such instances, however, dispute the claim that the power is incidental or implied. To be either incidental or implied it must be essential or necessary. Time and again has the matter been called to the attention of Congress and in every instance except as above referred to, it has inferentially concluded such right to be not necessary, and therefore, withheld it from national banking associations. This is admitted by the learned

Solicitor-General at pages 37 and 38 of the Government's brief, where he says:

"For over fifty years the executive department of the Government has consistently held, as a matter of administration, that the 'usual business' of a banking association must be transacted in a single and well-defined banking building; and this administrative construction of the law has additional weight, not only because Congress has, by supplemental legislation, acquiesced in it by passing laws which, in exceptional instances, authorized branch banks, but also because the agitation for the right to have branch banks has been carried on for many years, and, notwithstanding the vigorous attempt to secure legislation which would permit branch banks, Congress has heretofore refused to authorize such branches."

It, therefore, must be concluded that such authority does not exist, either by express terms or by necessary implication, and, also, that a national banking association is not possessed of inherent power in this direction.

II.

Branch Offices for Receiving Deposits and the Cash- ing of Checks Are Not Permissible Under Federal Law.

To upturn the law and its long-continued legislative, departmental and generally accepted construc-

tion is a problem for Congress and not for this Court to determine; nor is the wisdom of the problem lodged with the Court.

If Congress did not intend to withhold branch offices for the purpose of receiving deposits and paying checks from national banks, why did it in the conversion section (Sec. 5155, U. S. R. S.) restrict the right to a certain character of branch banks? That is, why did it by definite words require certain qualifying conditions? Why did it say, "It shall be lawful for any bank or banking association, organized under state laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions," if it did not intend to exclude the establishment or operation of branch offices of the character in question?

It is plain that when Congress enacted Section 5155, U. S. R. S. (the conversion statute) it did not intend to open the floodgates to innumerable branches, offices and service stations. It was then and still is opposed to branch banks to any extent or in any form, yet it realized that if a state bank possessing legitimate branches wanted to convert itself into a national association, it should have the privilege of doing so. But to be sure that every branch which that state bank then possessed and intended to continue was in reality a bank, it compelled an alloca-

tion of the capital stock, etc., of the bank to and among the mother bank and the branches thereof in proper regulated proportions. Congress did not intend to authorize the conversion of any state bank having branches unless its capital "being joint and assigned to and used by the mother bank and branches in definite proportions" was so continued under federal authority to the same extent as required by such state law. The intent of this language is that under such circumstances only would branches be suffered, and they must be qualified as to capital and circulation, thereby most forcefully imputing a firm intent to again restrict all of the usual operations of national banks to the one office or banking house, and that the exception created by this conversion statute would apply only to branch banks of substance and capital, and would, in effect, be a bank with one office or banking house for its own activities, enabling such parent bank to compete with state banks having like branches in the same competitive atmosphere and upon the same basis. By this conversion statute, Congress has not authorized the conversion of state banks into national banks where the state banks merely possess branch offices for the reception of deposits and the payment of checks. It eliminates all such institutions from the rights of the section.

By construing this section (5155 R. S.) in connection with Sections 5134 and 5190, U. S. R. S., we find the legislative mind has grasped for and used words that negative the right of a bank to conduct any part of its usual business of receiving deposits other than at its one banking house, because receiving deposits is transacting usual business.

A bank, as understood by the American public, is, and always has been, a place for the deposit of money for safe keeping and the withdrawal of the same upon check. The business of receiving deposits and paying checks is "usual" business, and we might say in so far as a large part of the public is concerned, is the principal business of banks. Under no circumstances can it be placed in the category of **unusual business**. It can, with equal propriety, be said that making loans or discounting bills is not usual, but is unusual, business.

The harm branch banks or branch offices would do aside from making the bank complex in operation and difficult to examine, is that it opens the way for the establishment of an office here and an office there, promiscuously, for the purpose of receiving deposits in opposition to smaller banks established in the neighborhood in which the branch office is to be located. Such branch offices thereby become scavengers in the business of obtaining deposits, its operations unwholesome. Centering in monopoly and cen-

tralization, its object to destroy and force out of existence the small neighborhood bank is soon accomplished.

No branch office of a national bank should be established for the reception of deposits and the payment of checks in any industrial or residential center unless it be properly equipped to loan the money of its depositors to the people of the community upon which it depends for its success. This is in keeping with the spirit and purpose of our independent banking system. Whenever the business of a given locality or community becomes of sufficient importance to justify the establishment of a bank, public policy requires it to be a real bank, possessing all of the powers and burdened with all of the duties that a bank should owe to the community. A branch office of another bank, to receive deposits only, would not meet the requirements. It would obtain the deposits of the people in the community, transmit them to the mother bank, where these funds would, to a large extent, be loaned to customers or patrons coming in daily contact and dealing directly with the mother bank at its main office or banking house.

Then, too, in the capital requirements Congress has made it plain that the purpose of the law is to provide for the organization of banks suitable and adaptable to a given locality or community in the large city as well as the small town or village. The

range is from \$25,000 to \$200,000 as a minimum. Can it be said that Congress intended to encourage the organization of banks and, as soon as they are shown to be profitable and of service to the community, that they are to be destroyed and driven out or swallowed by larger banks which are allowed to establish offices or service stations in the community, all because of the centralizing and monopolistic disposition of one or a few larger institutions?

From the foregoing we gather the real and substantial idea of the legislative mind in compelling a national bank to transact all of its usual business at one office or one banking house, and although it be said that in this way it is "cribbed, cabined and confined" to one place, there is, nevertheless, a most substantial reason for it—a reason which apparently appealed to Congress—and the courts should not and will not destroy the protection which Congress, by the law in question, gives to the industrial, commercial and banking public.

Sections 5134 and 5190 U. S. R. S. were construed by the Solicitor of the Treasury in his opinion rendered August 10th, 1899. This opinion dealt with the right of a national bank to establish and maintain an auxiliary cash room at some point in the city distant from its banking house, for the purpose of receiving deposits and paying checks. He said, "I am of the opinion that the statute does not authorize

the establishment of an auxiliary cash room in a different part of the city for the purpose proposed" (Instructions of the Comptroller, 1920, p. 110). This seems to have been the construction placed upon the law prior to the date of this opinion and at all times subsequent thereto, and no direct, inexcusable breach thereof can be shown to have been committed save and except in the instant case.

We, therefore, submit that branch offices for the purpose of receiving deposits and the payment of checks, like branch banks, are not authorized.

III.

The States, by Virtue of Their Sovereign Power, Can and Should Suppress or Abate Conduct by National Banks or Other Federal Agencies Committed Without Authority of Federal Law Which is Destructive of Their Welfare, Institutions and Laws.

While the laws of Congress are the laws of the land and in their lawful execution no interference will be permitted to prevail over them, yet when the agents or agencies of the Nation step beyond the authority of their master and violate state laws and undertake to harm the people of the state by the exercise of a function not granted by Congress, then as to such unauthorized acts, any offended state pos-

sesses the inherent right by any proceedings deemed by it proper to abate and suppress the wrongful conduct.

It is the duty of the respective states to protect and safeguard their own institutions, not only by the enforcement of the law under which the institutions exist, but against any intrusion under the guise or unwarranted claim of national authority. Therefore, if the bank, as in this case, has not been lawfully authorized to conduct the business complained of and sought to be abated or prevented, the hand of restraint cannot be laid against the state in the exercise of its sovereign power.

That national banks are instrumentalities of the Federal Government and as such are necessarily subject to its paramount authority goes without question. There is no other warrant for their existence. But simply because they are federal instrumentalities does not imply their right to invade state laws and inflict injury upon the society and business of the state by conduct, not only unauthorized, but prohibited by Congress. Being creatures of federal authority does not shield them against the complaint of the state founded upon unlawful conduct not permitted by federal law .

The Government in its brief assumes the position that a state court cannot impede or suspend the operations of a federal instrumentality upon the ground

that the act of Congress under which the federal instrument is operating is unconstitutional. This we deny. The Government has found no authority of this Court to sustain its position. It is fundamental that the state, being a distinct and separate sovereignty, has a right in any case where its interests are affected to challenge the validity of an act of Congress or the right of a federal agent to commit an act claimed by it to be committed under authority of federal law. It is true the judgment and decision of the state court is subject to review by this Court as the final arbiter of the law upon the subject, but the primary right of the state in a case of this sort should, we feel, stand admitted by all—this to the end that both sovereignties, to a certain extent dual in character, may work side by side, each relying in full confidence upon the guaranties afforded by the Constitution of the United States and upon the wisdom, experience and learning of this Court as the final arbiter between them upon constitutional and federal questions when either feels itself aggrieved by the conduct of the other.

The Government, at page 13 of its brief, refers to two cases in support of its position as above stated as being leading cases upon the subject, to wit, *Ableman v. Booth*, 21 How. 506, and *Tarble's case*, 13 Wall. 397. An examination of these cases will dis-

close the presentation of a situation entirely different from the one here involved.

The two cases of *Ableman v. Booth* and *United States v. Booth*, 21 How. 506, argued and submitted together in this Court, were cases wherein the defendants were held in violation of federal law by the federal court. Habeas corpus proceedings were instituted in a state court, and the prisoners discharged on the ground that the federal laws under which they were held and convicted were unconstitutional. This Court, of course, held that state courts have no right to release on habeas corpus a prisoner held or convicted by a federal court for violation of a federal law.

In the *Tarble* case, above referred to, *Tarble* had enlisted in the United States army. It was claimed that he was under age and that he had enlisted under an assumed name. He sought release by habeas corpus proceedings in the state court. The commanding officer of the army made a return to the effect that he, as First Lieutenant, had by due authority command of all soldiers recruited for the army in Madison, Wisconsin; that the prisoner under the name of Frank Brown was regularly enlisted as a soldier in the United States army for a period of five years unless sooner discharged by proper authority; that he had taken the oath required in such case; that subsequently he deserted the service, and being re-

taken, was then in custody and confinement under charges of desertion, awaiting trial by the proper military authority. This Court properly held that the state court was without jurisdiction to issue the writ of habeas corpus because it appeared that the prisoner was held by an officer of the United States; that he had submitted himself to the military authority of the United States as an enlisted soldier, and he had his remedy through the regularly constituted channels established by the Government if he was improperly held.

To have held differently either in this or in the Ableman case would be permitting a state court to interfere with the lawful operations of Federal agents as well as Federal judicial authorities regularly and lawfully constituted. That, however, is not this case. Both Tarble and Ableman were within the jurisdiction of the Federal Government. Their right to relief, if improperly held, could be clearly ascertained through Federal instrumentalities; but here, the sovereign state has been offended; its laws trampled upon; its institutions injured. Must it submit to this, even though it can secure redress, as it is seeking to do in this proceeding, without contravening Federal law or policy, but on the contrary in perfect harmony therewith.

This Court said in *Moore v. Illinois* (14 Howard

13), approved in *Grafton v. United States* (206 U. S. 333), that:

“An offense in its legal signification means the transgression of a law. * * * Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the law of either.”

What is true of an act which constitutes a crime against the state and against the United States is, *a fortiori* true of a course of conduct which is a usurpation upon the sovereignty of both. The establishment and conduct of a branch bank not being authorized by Congress to anyone and being expressly forbidden by the state statute constitute an usurpation upon both sovereignties, the usurpation being a wrong as to each as being a transgression of its law. That a ministerial officer of the United States does not choose to enforce its laws, is indifferent to their violation, does not militate against the right of the state. The right of the state is measured by its laws in so far as they do not conflict with the laws of the United States. As said by Justice Bradley in the *Siebold* case, the power of the United States to “enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same

places. The one does not exclude the other, except where both cannot be executed at the same time." We grant that a national bank is a federal agency and that it may execute its functions wherever and in whatsoever manner Congress has authorized, but the operation of a branch bank is not one of its functions. If it is, of course, that is the end of the matter, and by the same token, if it is not, there is something more to be said. If it is not, there is no conflict between state and federal authority. That as an incident to enjoining the usurpation upon state authority the usurpation upon federal authority will cease is but a consequence of the same act being a usurpation upon both. No evil results are to be apprehended from the state's vindication of the authority it asserts. It is the consequence of a denial of the state's authority that is rather to be apprehended. If a national bank may establish a branch or branches in the city of its location in defiance of all law, because a ministerial officer of the Federal Government will not act to restrain, then his indifference or caprice becomes the measure of the bank's authority and it may establish branches wheresoever it pleases in the state. And so it may usurp other functions. It may, regardless of the restrictions of federal law, assume the functions of executor, administrator, curator, guardian and generally all trust functions, and

the complaint of the state of the usurpation upon its authority be met with the answer that, "You are without redress for the wrong you suffer, because the conduct of which you complain is also a usurpation upon the authority of the United States."

Where the same act is a crime against both sovereigns, the entrance to that extent of the Federal Government into the field does not exclude the state, although it is recognized that on humanitarian principles both governments should not, and would not, save in exceptional cases, prosecute and punish. The just and reasonable demands of both governments would be met by one prosecution and one punishment, and where the one had begun action the other would remain inactive unless there was reason for a contrary course. But in such case no conflict of authority is involved, for the law of each sovereign is in harmony with the law of the other, and the possible or probable action of the one is invoked in vain against the action of the other. This argument finds support in the recent cases of *First National Bank v. Union Trust Co.* (244 U. S. 427) and *American Bank and Trust Co. v. Federal Reserve Bank* (256 U. S. 350).

IV.

**As to the Character of the Proceeding Employed by
the State in Securing the Relief to Which
It Is Entitled.**

(a)

The State possessing the right to proceed may employ such judicial means as it may deem appropriate under its own judicial system with the full right of the aggrieved party to obtain a review by this Court of the judgment, final order or decree upon writ of error. Under a long line of decisions this will pass without fear of being questioned.

We have examined the information filed by the Attorney-General of Missouri in the Supreme Court of that state in this cause. It is in the nature of, if not in fact a bill in equity which, from the history of that court, as ascertained from its records, has been adopted as a means of relief from unlawful conduct of corporations inimicable to and in contravention of the law and policy of the state. It is not an information in quo warranto and although termed by some as being in the nature of a writ of quo warranto, it nevertheless, in that state, takes the form of and assumes the position of a bill in equity asking for equitable relief against the plaintiff in error on account of conduct in violation of the

law of Congress, and which unlawful conduct being also in violation of state law, tramples upon such state law and is destructive of the financial, business and industrial interests of that state. The information asks for a temporary restraining order against not only the bank, but its officers, agents and servants as well, which is a means commonly used in cases of this sort in that state.

In addition, as in all cases in equity, it asks "that such other orders and relief be granted as to the Court shall seem meet, just and proper."

That the information in this cause and the relief sought thereby is distinctly equitable seems to be admitted by the Government in its brief at page 6, where it says:

"While an ouster is prayed for, yet none was asked and none was given against the corporate entity. What was attempted was to restrain by a pretended ouster a federal instrument from operating its branches in the State of Missouri, and the relief granted was essentially an injunction, which sought to restrain the bank from maintaining certain branch offices (banks) in the State of Missouri."

Missouri is asking that the bank be restrained from maintaining a certain branch bank in that state and establishing others therein. From the language of the information and pleadings filed by the bank in

opposition thereto, as well as the final conclusions of the state court thereon, and the relief obtained therefrom, it is in every respect a proceeding in equity. It did not seek to deprive the bank of any of its lawful rights or to oust it of any of its charter powers.

It is immaterial, however, to this Court what this plea may be called. The case is here on writ of error for the substantial purpose of determining whether the conduct complained of is permissible under federal law and if not, can such conduct be suppressed by the state.

(b)

This is not a suit to exercise what is generally known as "visitorial power" over a corporation. The right of the Government through the Comptroller to make such visits by judicial proceedings or otherwise is admitted; the right of the Government through the Comptroller of the Currency to exact from the banks a strict compliance with all of the national laws is also admitted. We know the Comptroller is authorized under Section 5239, U. S. R. S., to bring suit for forfeiture of charter whenever, in his judgment, the bank has violated any of "the express provisions" of the National Bank Act. Having brought national banks into existence with certain restricted

and definite powers, it is but natural that Congress would and should enact laws for the regulation, control, examination, winding up and dissolution of those institutions, as well as to confine them to their charter powers. But the fact that Congress has so enacted does not mean, or even imply, that the state, in its sovereignty, is without authority to require a due observance of the law by such banks when its interests are injured or its rights invaded, and such injury and invasion be occasioned by an act of a national bank not authorized by its charter.

This case no more partakes of the exercise of a visitorial power than does the enforcement of any private right against a national bank, because of an unwarranted or unlawful transaction. The right of the state is deeper than the mere right of visitation. It is an inherent right of the state to abate unlawful conduct of national agencies when the tendency of such conduct is to paralyze the institutions and interests of the state which are objects of its care and protection, and that right becomes most apparent when the ministerial officer of the federal government, having in charge the enforcement of the federal law, fails or refuses to act.

The right of the State to proceed is always present, but the necessity for such proceeding should be avoided by prompt action upon the part of the Federal Government. It generally is thus avoided and

consequently no case of this exact character involving the operations of national banks has heretofore found its way to this court, and it is only in cases of this sort that the States here represented insist upon the right to a free exercise of their respective sovereign powers.

The position assumed by plaintiff in error and the Government in this case is not supported by the authorities submitted by them upon this point. For instance, in the case of **Tennessee v. Davis** (100 U. S. 257) it was necessary for this Court to find that the act complained of was committed by warrant of Federal authority before it could hold that the officer was protected against state interference.

The cases of **McCulloch v. Maryland** (4 Wheat. 316), **Davis v. Elmira Savings Bank** (161 U. S. 275), and **McClellan v. Chipman** (164 U. S. 347), cited by plaintiff in error and the Government, are all cases holding that Federal agencies, being subject to the paramount authority of the United States, cannot be interfered with by the States on account of conduct for which Federal authority has been given. These cases also as clearly hold that such immunity cannot be afforded when the conduct complained of violates Federal law.

Therefore, if the conduct complained of be without authority of both State and the Federal Government, is there any reason why, in our

system of government, either the Nation or the State may properly intervene, suppress and restrain? For that while our system of government is dual in its nature, yet throughout its entire history the paramount authority of the Federal Government has been recognized, and because thereof suitable means have always been provided for the transmission of causes from the state court to this Court on writs of error, thus enabling the various states of the Union and the Federal Government to work in entire harmony, and in case of disagreements as to either the law or the construction of the law as it pertains to the Federal Government, or rights thereunder, yield to the final and ultimate decision of this tribunal.

We, therefore, in the spirit of good faith, loyalty and law, submit that the conduct of the plaintiff in error complained of by the State of Missouri is unlawful, interferes with the society and institutions of that state, and that the state, in the exercise of its inherent governmental power, is clothed with authority to institute and prosecute this cause.

Respectfully submitted,

HERMAN L. EKERN,
Attorney-General of the State of Wisconsin.

CLIFFORD L. HILTON,
Attorney-General of the State of Minnesota.

ULYSSES S. LESH,
Attorney-General of the State of Indiana.

BENJAMIN J. GIBSON,

Attorney-General of the State of Iowa.

EDWARD J. BRUNDAGE,

Attorney-General of the State of Illinois.

H. H. CLUFF,

Attorney-General of the State of Utah.

MILTON J. HELMICK,

Attorney-General of the State of New Mexico.

GEORGE F. SHAFER,

Attorney-General of the State of North Dakota.

J. S. UTLEY,

Attorney-General of the State of Arkansas.

O. S. STILLMAN,

Attorney-General of the State of Nebraska.

CHARLES B. GRIFFITH,

Attorney-General of the State of Kansas.

FRANK E. HEALY,

Attorney-General of the State of Connecticut.

DAVID J. HOWELL,

Attorney-General of the State of Wyoming.

E. T. ENGLAND,

Attorney-General of the State of West Virginia.

THOMAS B. MCGREGOR,

Attorney-General of the State of Kentucky.

GEORGE F. SHORT,

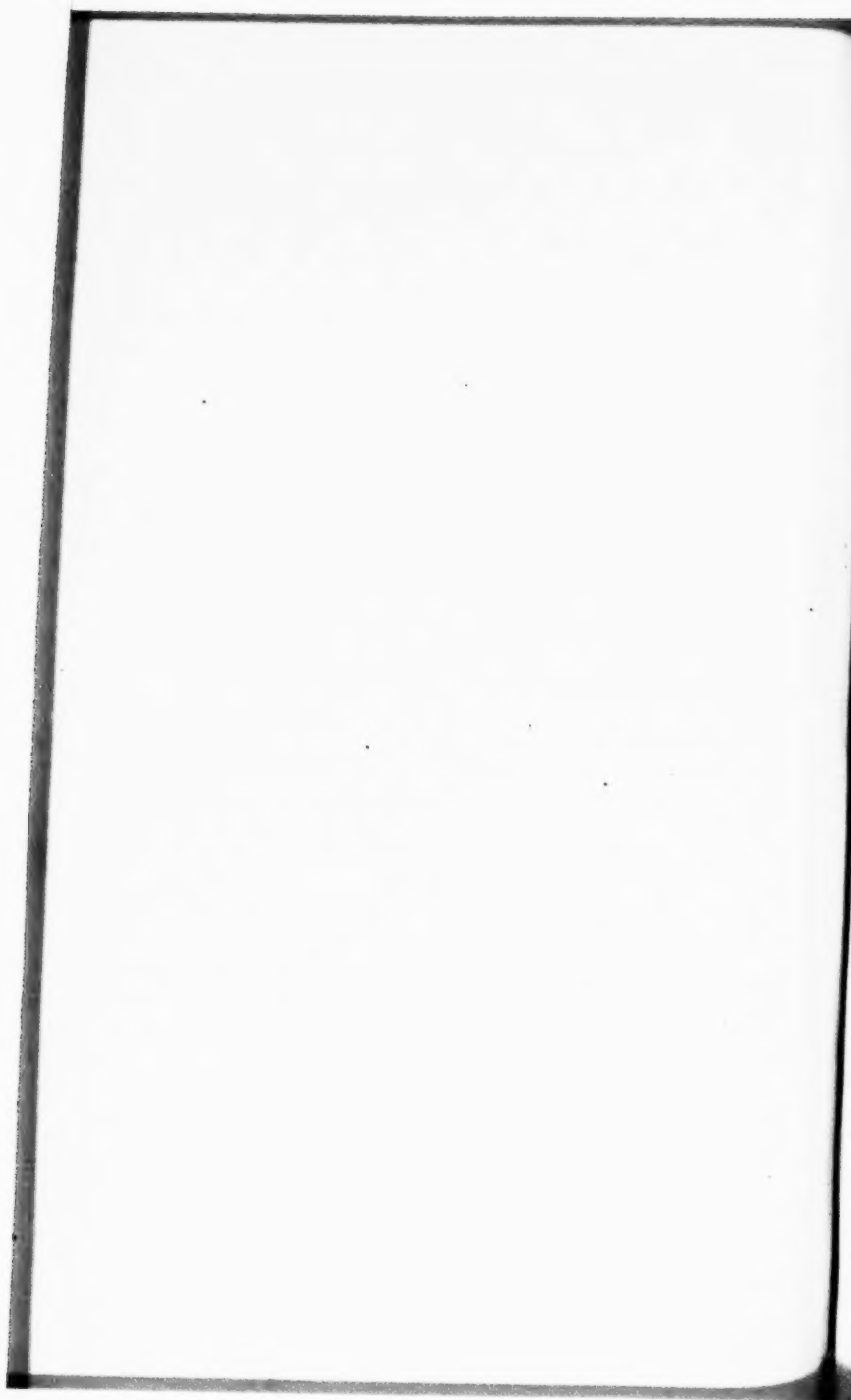
Attorney-General of the State of Oklahoma.

BUELL F. JONES,

Attorney-General of the State of South Dakota.

JOHN H. DUNBAR,

Attorney-General of the State of Washington.



OCT 12 1923

WM. R. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

19

FIRST NATIONAL BANK IN ST.
LOUIS,
Plaintiff in Error
(and Petitioner in Certiorari),

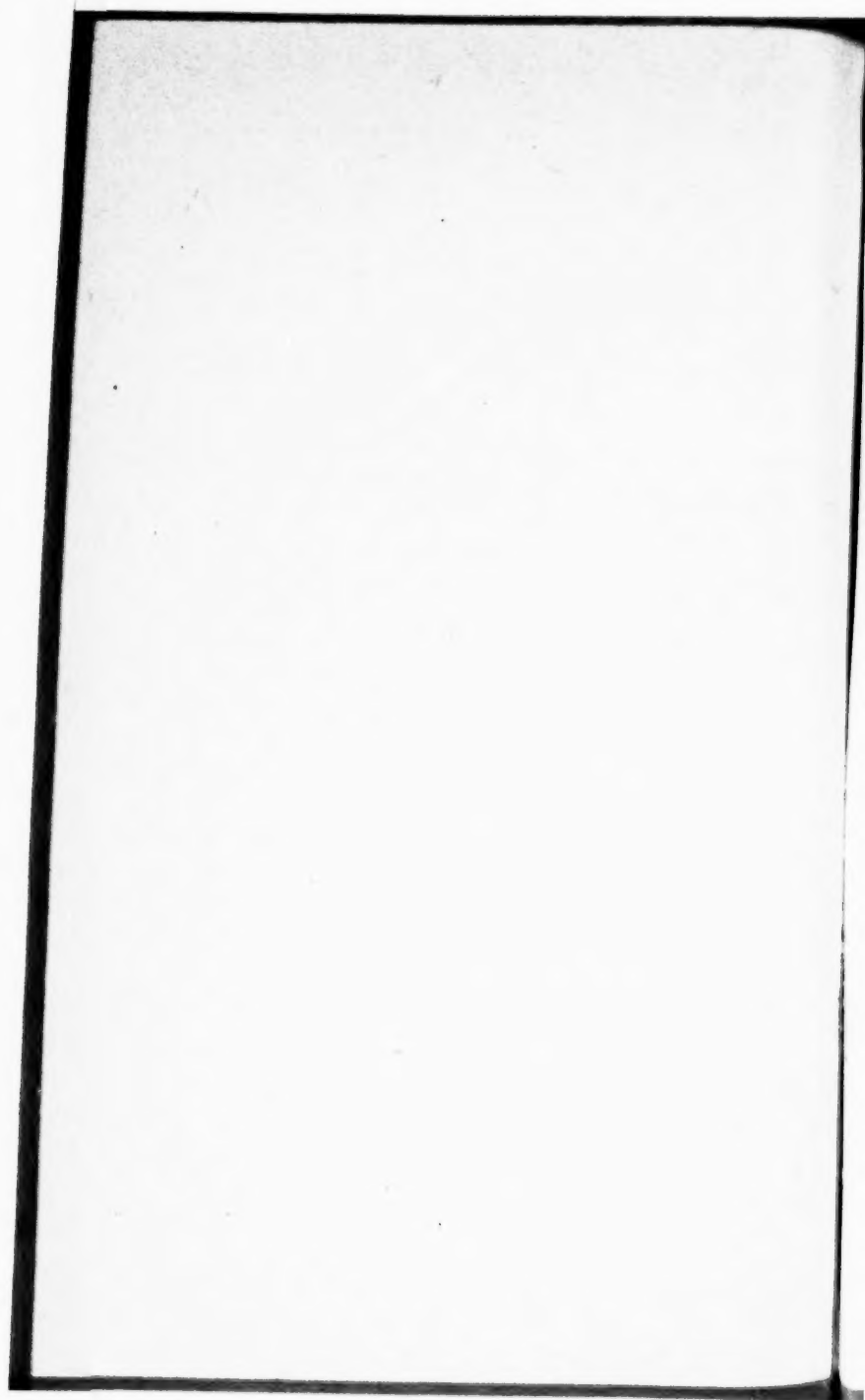
vs.

STATE OF MISSOURI, Upon Informa-
tion of JESSE W. BARRETT,
Attorney-General,
Defendant in Error
(and Respondent in Certiorari).

No. 252.

**PETITION FOR MODIFICATION OF ORDER
ON REARGUMENT.**

FRANK B. KELLOGG,
JAMES C. JONES,
FRANK H. SULLIVAN,
Counsel for Plaintiff in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST.
LOUIS,
Plaintiff in Error
(and Petitioner in Certiorari),

vs.

STATE OF MISSOURI, Upon Informa-
tion of JESSE W. BARRETT,
Attorney-General,
Defendant in Error
(and Respondent in Certiorari).

No. 252.

NOTICE.

The defendant in error will take notice that on Monday, October 15th, 1923, on the opening of the court, the plaintiff in error will ask leave to file a motion to modify the argument for reargument, a copy of which is hereto attached.

FRANK B. KELLOGG,
JAMES C. JONES,
FRANK H. SULLIVAN,
Counsel for Plaintiff in Error.

Service of the foregoing notice, with copy of petition for modification of order for reargument, is hereby acknowledged this. ~~7~~¹⁴ day of October, 1923.

JESSE W. BARRETT,
Attorney-General of the State of
Missouri.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST.
LOUIS,
Plaintiff in Error
(and Petitioner in Certiorari),

vs.

STATE OF MISSOURI, Upon Informa-
tion of JESSE W. BARRETT,
Attorney-General,
Defendant in Error
(and Respondent in Certiorari).

No. 252.

**PETITION FOR MODIFICATION OF ORDER FOR
REARGUMENT.**

And now comes First National Bank in St. Louis, plaintiff in error (and petitioner in certiorari), and respectfully shows to the Court that the questions arising upon the record of this cause are these:

1. The inherent power of a state to maintain proceedings to question compliance by a national bank with its charter.
2. The validity of a state statute limiting or

prescribing the corporate powers of a national bank.

3. The power of a national bank, under the Act of Congress, to maintain branch offices in the city, town or village in which it does business.

At the last term this order was entered by the Court in this cause:

“It is ordered that this case be restored to the docket for reargument at the next term on the issue whether the state had authority to institute and maintain a proceeding to question compliance by a national bank with its charter.”

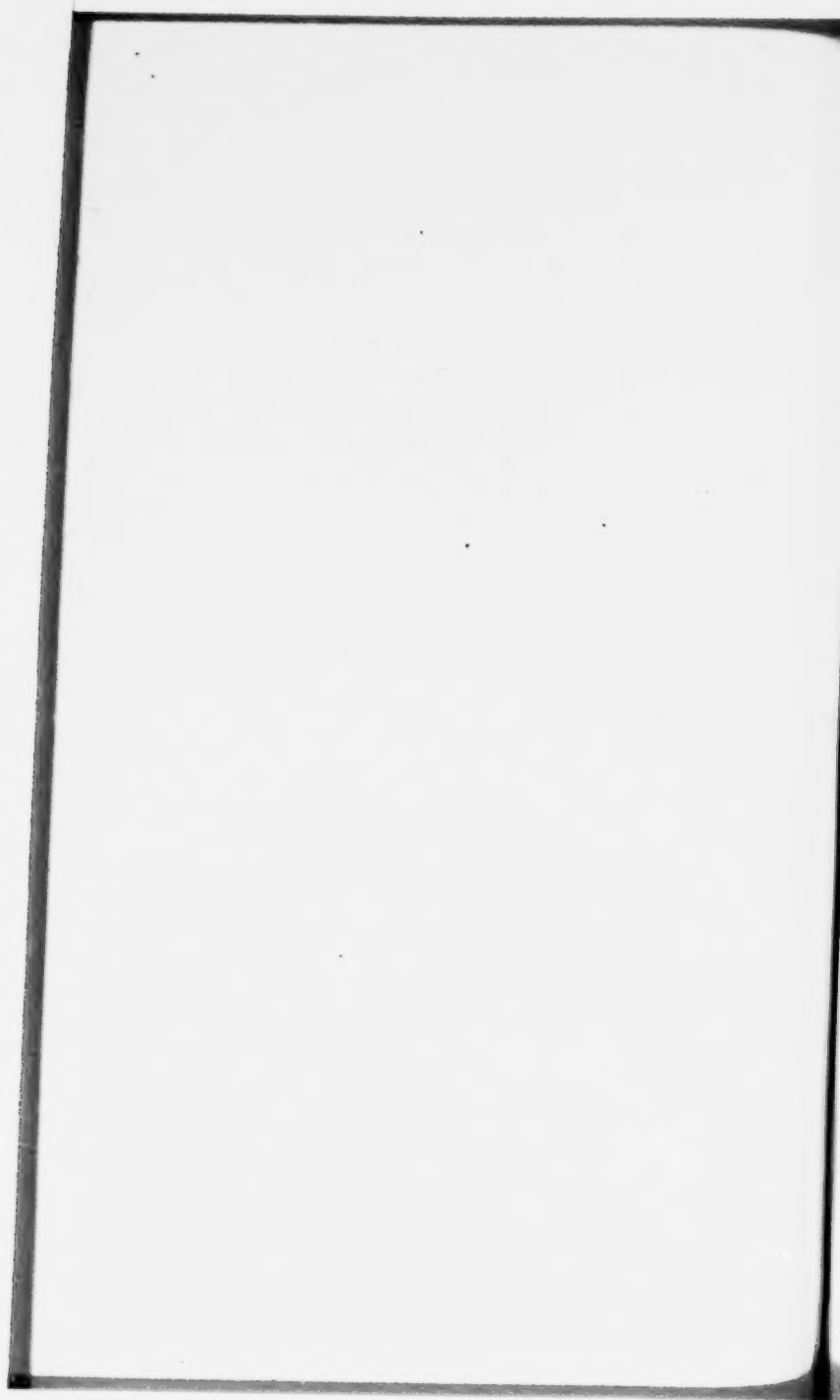
The question as to the proper powers of a national bank in the respect here involved is an important consideration, affecting national banks throughout the Union, and of great concern not only to the banks themselves, but to the business interests of the country.

The Attorney-General of the United States has since the prior argument rendered an opinion to the Honorable Secretary of the Treasury, affirming the power here in question. A copy of this opinion is appended hereto. This fact is of significance in view of the insistence of the defendant in error upon the alleged adverse departmental construction of the National Bank Act, at the prior argument, and in the briefs filed.

It is respectfully submitted by the plaintiff in error that the importance of the questions arising upon the record justifies a reargument of the entire case.

Wherefore, the plaintiff in error prays that the order for reargument be modified so as to permit of argument of the entire case.

FRANK B. KELLOGG,
JAMES C. JONES,
FRANK H. SULLIVAN,
Counsel for Plaintiff in Error.



DEPARTMENT OF JUSTICE.

Washington.

October 3, 1923.

Sir:—

I have your letter of August 30, 1923, requesting my opinion on the power of national banking associations to open and operate offices at places other than their banking houses for the performance of such routine services as the receipt of deposits and cashing of checks for their customers. You request to be advised whether:

(1) Assuming that a national banking association is without power to establish and maintain a branch bank for carrying on a general banking business, has it the corporate power to open and operate an office or offices at a place or places other than its banking house, for the performance of such routine services as the collection of deposits and cashing of checks for its customers?

(2) If a national banking association has the corporate power to open and operate such an office or offices, must they be located within the city limits of the place designated in the organization certificate of the association as the place where its operations of discount and deposit would be carried on?

The statutes relating to national banking associations, so far as they are material to our present inquiry, are Sections 5133, 5134 (Par. 2), 5136 (Pars.

6 and 7), and 5190, R. S. The material parts of said statutes read as follows:

“Sec. 5133. Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs.”

“Sec. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

* * * * *

“Second. The place where its operation of discount and deposit are to be carried on, designating the state, territory or district, and the particular county and city, town or village.”

“Sec. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

“Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which the stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred,

its general business conducted, and the privileges granted to it by law exercised and enjoyed.

“Seventh. To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes, according to the provisions of this title.”

“Sec. 5190. The usual business of such national banking associations shall be transacted at an office or banking house located in the place specified in its organization certificate.”

The provisions of Section 5190, R. S., as to the place at which the usual business of the bank shall be transacted refers to the city or town in which the bank is located and not the particular place within the city (*McCormick v. Market Nat'l Bank*, 165 U. S. 538, 549).

National banks have only those powers specified in the National Banking Acts and such other powers as are necessarily incidental thereto (*McBoyle v. Union Nat'l Bank*, 122 Pa. 458; *First Nat'l Bank v. Nat'l Exchange Bank*, 92 U. S. 122, 127; *Logan Co. Nat'l Bank v. Townsend*, 139 U. S. 67, 73; *Bullard v. Bank*, 18 Wall. 589, 593).

In *Bullard v. Bank*, *supra*, the Supreme Court said:

“The extent of the powers of national banking associations is to be measured by the act of Congress under which such associations are organized.”

In *Logan Co. Nat'l Bank v. Townsend*, supra, the Court said:

"It is undoubtedly true, as contended by the defendant, that the National Banking Act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

It is to be observed that Section 5190, R. S., relates to the "usual business" which, in my opinion, is to be construed the general banking business usually conducted by national banks. There is no statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the association.

In my opinion, a national banking association may establish in the city or place designated in its certificate of organization an office or offices for the transaction of business of a routine character, which does not require the exercise of discretion, and which may be legally transacted by the bank itself. It may not, however, establish a branch bank to do a general banking business such as is usually done by national banks. The establishment of such a branch would be illegal and subject the offending bank to the forfeiture of its charter (29 Op. 81).

It seems to be the intent of the National Banking Act that the business of banking ordinarily transacted by a national banking association shall be performed in the city or place designated in its organization certificate.

It has been held that a national bank cannot make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank (*Armstrong v. Second Nat'l Bank*, 38 Fed. 883, 886).

While national banking associations may exercise all the powers expressly given them by the statute, and such additional powers as may be necessary to carry on the business of banking, the manner in which the powers may be exercised is subject to the supervision of the Comptroller of the Currency. Should the Comptroller, in the exercise of his supervisory powers over national banks, ascertain that the directors or officers have knowingly violated, or are violating, the national banking laws, he may proceed against such association, its officers and directors as provided by Section 5239, R. S., which reads as follows:

“If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate, any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.”

Answering your specific questions I have the honor to advise you as follows:

First. National banking associations have the power to open and operate offices at places other than their banking houses, within the place specified in their organization certificate, for the performance of such routine services as the receipt of deposits and the cashing of checks for their customers.

Second. National banking associations have no authority to open offices for the purpose of receiving deposits, paying checks, etc., outside of the limits of the city or place designated in the organization certificate as the place of its operations of discount and deposit.

Respectfully,

H. M. Daugherty,
Attorney-General.

The Honorable,
The Secretary of the Treasury.

FILE COPY

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OCT 15 1923

WM. R. STANSBU

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923. 20

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in Error
(and Petitioner in Certiorari),

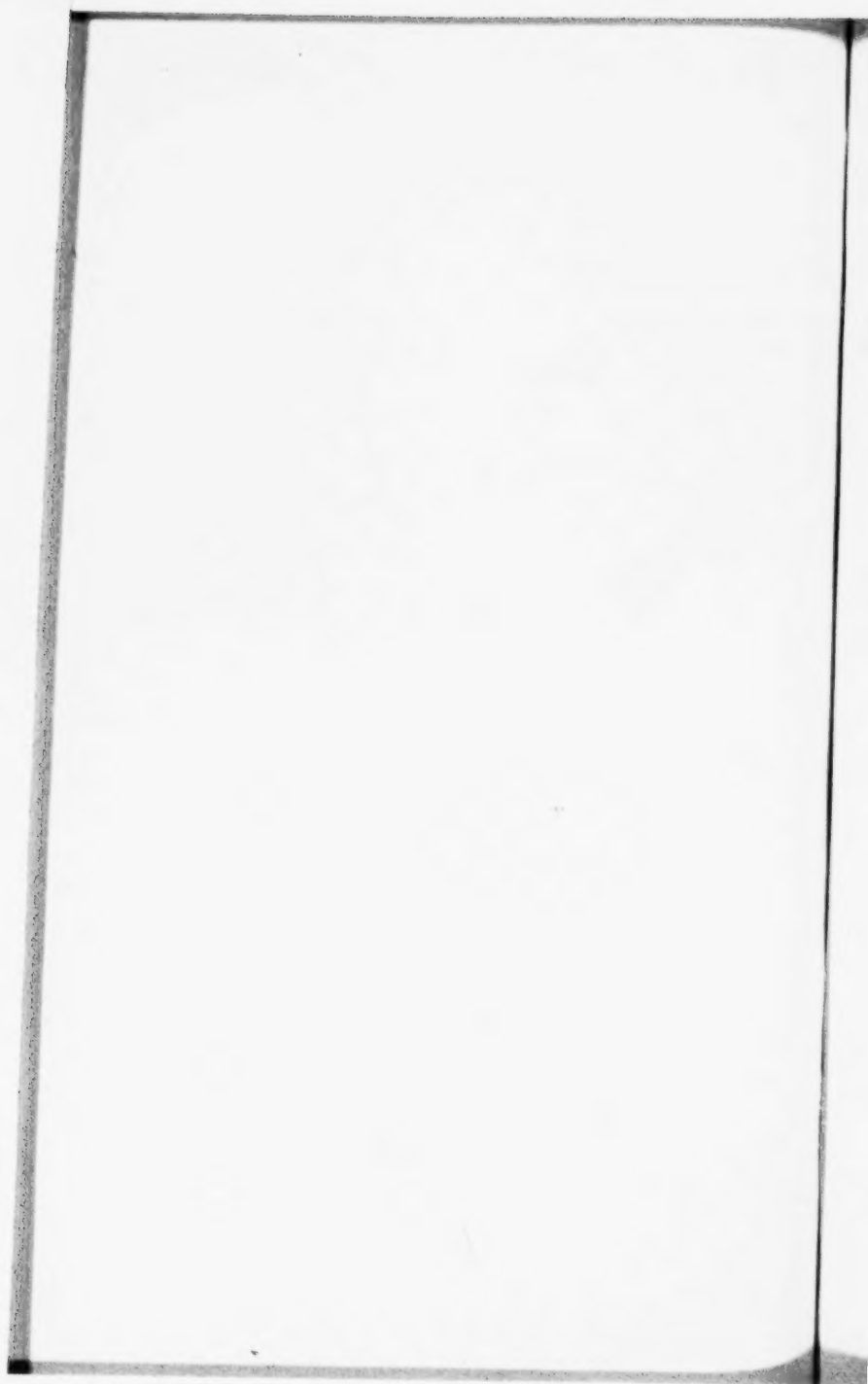
vs.

STATE OF MISSOURI Upon Informa-
tion of JESSE W. BARRETT,
Attorney-General,
Defendant in Error
(and Respondent in Certiorari).

No. 252.

**SUGGESTIONS IN OPPOSITION TO PETITION
FOR MODIFICATION OF ORDER
FOR REARGUMENT.**

JESSE W. BARRETT,
Attorney-General of Missouri,
Defendant in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS, Plaintiff in Error (and Petitioner in Certiorari), vs. STATE OF MISSOURI Upon Informa- tion of JESSE W. BARRETT, Attorney-General, Defendant in Error (and Respondent in Certiorari).	} No. 252.
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**SUGGESTIONS IN OPPOSITION TO PETITION
FOR MODIFICATION OF ORDER
FOR REARGUMENT.**

Comes now the State of Missouri and suggests to the Court that:

First. The petition for modification of order for reargument made by the plaintiff in error herein greatly extends the issues for discussion beyond those shown by the record in this case and beyond those presented

to and tried by and determined by the Supreme Court of the State of Missouri.

Second. While we would contend that the maintenance of an office for the reception of deposits and payment of checks constitutes a bank within the meaning of the law, and as that term is generally understood by the American public, yet that question was not presented by the pleadings in the state court, and was not presented to nor determined by the state court and, therefore, is not in issue in this cause.

Third. Respondent shows that the third question which plaintiff in error suggests for reargument, to wit, the power of a national bank under the Act of Congress to maintain **branch offices** in the city, town or village in which it does business, was not submitted to nor determined by the Supreme Court of Missouri, nor was it presented by the pleadings in that case.

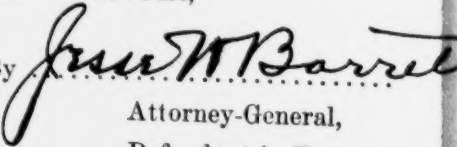
The allegation of the information in that respect being that "the said First National Bank in St. Louis did, on or about the 15th day of June, 1922, illegally open a **branch bank for conducting a general banking business** at No. 818 Olive street, St. Louis, Missouri, in a separate building located several blocks from the banking house before mentioned, which said **branch bank** it is now conducting and proposes to continue to conduct, and where it is engaged in the busi-

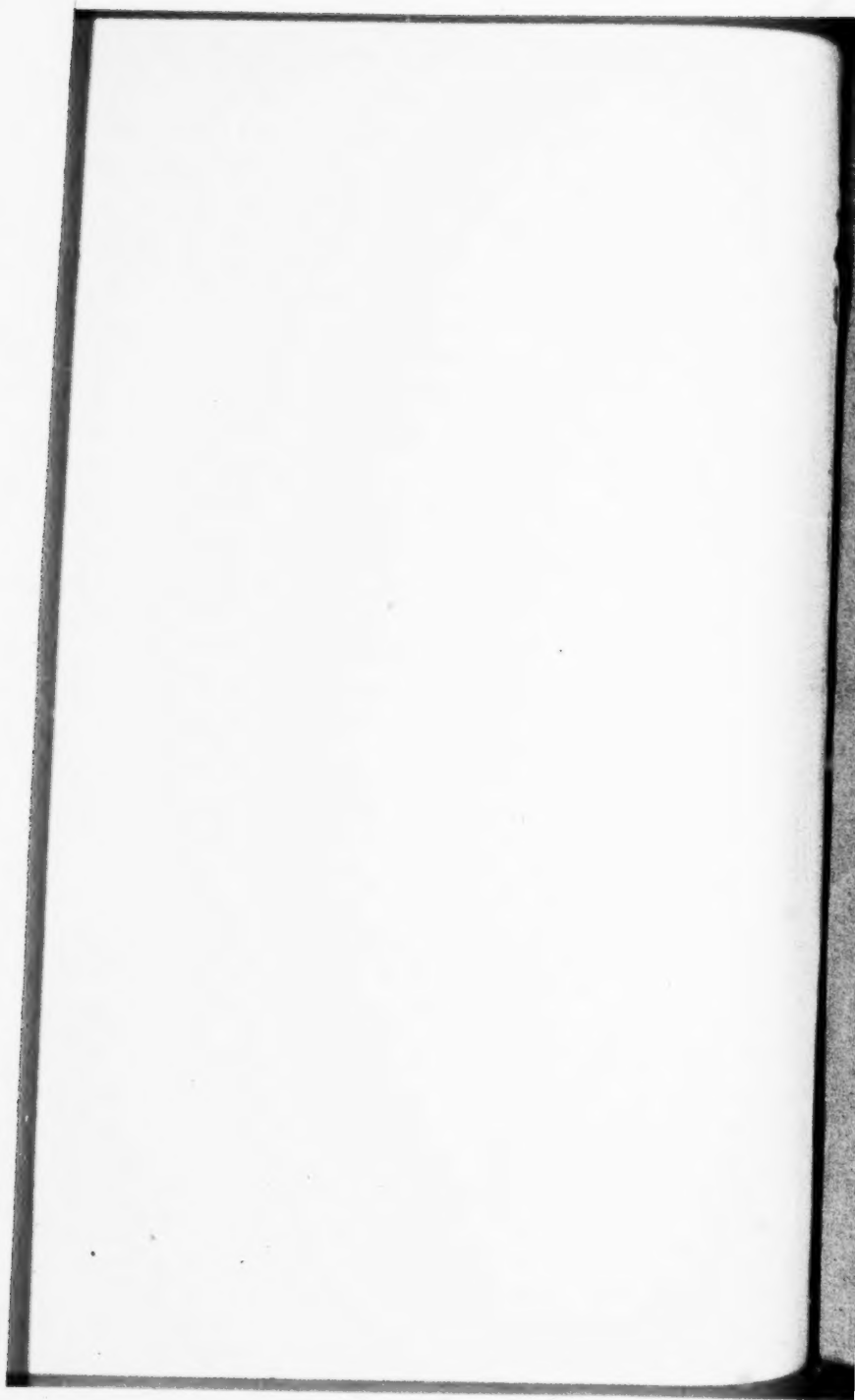
ness of banking, discounting bills and notes and other evidences of debt, receiving deposits and paying out the same upon check, buying and selling bills of exchange and lending money” (Rec., p. 1), the allegations of the information were admitted by the demurrer of the plaintiff in error to be true, and no other issue was presented in the case in the state court as to what the plaintiff in error had done, was doing, or intended to do.

The issue before the state court, therefore, was not as to the power of a national bank under the Act of Congress to maintain **branch offices** in the city, town or village in which it does business, but was as to the power of a national bank to establish, operate and conduct a **branch bank** in the city, town or village in which it was doing business.

Respectfully submitted,

STATE OF MISSOURI,

By 
Attorney-General,
Defendant in Error.



FIRST NATIONAL BANK

STATE OF MISSOURI
of JEROME W. BARNETT, Sheriff
General,

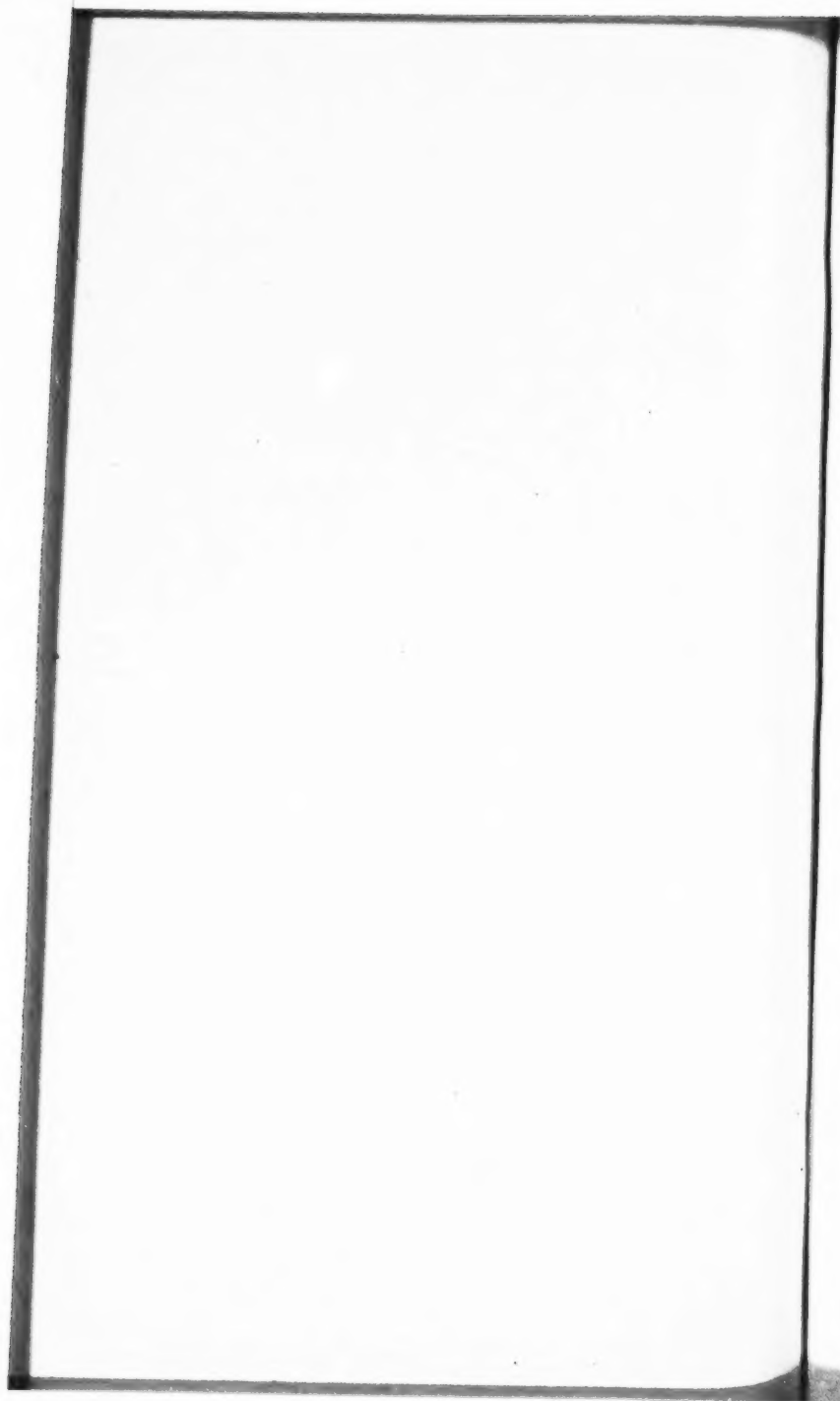
PREPARED FOR DEPOSIT

JAMES C. JONES

FRANK S. SULLIVAN

For Plaintiff in Error

St. Louis Law Printing Co. 414 N. 2nd St. St. Louis, Mo.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS,	}	No. 252.
Plaintiff in Error,		
vs.		
STATE OF MISSOURI Upon Information of JESSE W. BARRETT, Attorney- General,		
Defendant in Error.		

PETITION FOR REHEARING.

And now comes the plaintiff in error and respectfully asks for a rehearing of this cause, for the reason following:

The majority opinion is in error in affirming the validity of Revised Statutes of Missouri, Section 11737, as applied to a national bank.

In support of which the plaintiff in error submits these considerations:

A. The statute in question is a part of a statutory scheme for the organization and regulation of banking corporations. This is made manifest by an examination of accompanying sections of the statute, such as Sections 11728, 11729, etc. (Revised St. Mo. 1919). Indeed, it is equally plain from the terms of section 11737 itself. Previous sections having provided for the formation of banking corporations, the provisions of section 11737 are introduced by this language: "Every *such corporation* shall be authorized and empowered," etc. Following this is the enumeration of the corporate powers conferred upon the creatures thus provided for, and appended thereto are the words: "*Provided, however,* that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in *its own banking house.*"

The statute is barren of any suggestion of a legislative intent to regulate *the number of banks which may compete with each other in a given community*, except in the denial of *capacity to a corporation* to own more than one of them. This is the necessary effect of the language of the statute, and there is nothing in the opinion of the State Court to indicate otherwise.

It was apparently thought unwise that one *corporation* should own or operate more than *one bank*, and *corporate capacity* to do so was denied.

The majority opinion, in its essence, therefore, affirms the power of a state to regulate the corporate capacity of a national bank. Regard for fundamentals of our system of government demonstrates that this cannot be.

The conclusion is rested solely upon general expressions of prior opinions, dealing with state statutes of far different import and effect.

B. The state statute forbids an incorporated bank to pay checks at any place other than its own banking house. In *Merchants Bank v. State Bank*, 10 Wall. 605, this Court held that under the National Bank Act, and notwithstanding Revised Statutes, Section 5190, a bank has *incidental power* to purchase bullion and certify the checks of its customers and disburse its funds at a place *other than its banking house*. The statute of the state, therefore, if valid, *has effect to deprive a national bank of a portion of the incidental powers conferred upon it by Congress.* How can a State Legislature repeal an Act of Congress respecting the powers of a national bank?

C. As a specification admitting of no exception, the formula that a state statute affecting a national bank is valid unless it conflicts with an Act of Congress, or

impairs the efficiency of the bank as an agency of the National Government, is too broad if applied without reference to the provisions of the statute itself.

It was first made use of in *National Bank v. Commonwealth*, 9 Wall. 353, in dealing with the exercise of the *power of taxation conferred by Congress on the states*. Read in the light of what was there in judgment, *the expression is that state legislation directly affecting national banks is valid when authorized by Congress and when so framed as not to conflict with national legislation or to impair the efficiency of the bank*.

The later applications of the rule have been to "general, undiscriminating laws" (*First National Bank v. California*, 262 U. S. 366, 369), passed, *not to regulate affairs of national banks or their corporate capacity and functions*, but in regulation of business transactions of the community of which they are a part.

D. The cases hitherto at the bar of the Court which have really dealt with the question here in judgment have been *McCulloch v. Maryland*, 4 Wheat. 316; *Osborne v. Bank*, 9 Wheat. 738, and *Easton v. Iowa*, 188 U. S. 220, 230, 237.

In the two former there were under review state statutes designed to regulate the corporate functioning of national banks. The opinions were based, not

on any conflict between state and national legislation, but upon *the entire lack of sovereignty of the state over the subject matter.*

In *Easton v. Iowa* the statute proposed to regulate the internal management of the bank; and that pronouncement dealt with the question from both aspects, *i. e.*, state regulation of the internal affairs of a national bank, and conflict with Congressional enactments. As to the former, it was said that national banks were "*independent, so far as powers are concerned, of state legislation.*"

The true rule to be extracted from the utterances of this Court is that the state may *regulate the contracts and dealings of the community*, and the regulation is binding on national banks as members of the community, unless Congress has prescribed a different rule as to national banks or the regulation impairs their efficiency; but questions as to their *corporate capacity* are determinable only by those laws which *confer* the capacity. A state statute dealing with *that subject* fails for an inherent lack of sovereignty over the subject; no matter what Congress may or may not have prescribed on the same question.

E. It is respectfully submitted that, under the pronouncement of the majority opinion, a state statute of this type is held valid only when entirely ineffectual and without force or effect.

It is said that R. S. 5190 forbids a national bank to have a branch office. And if Congress have not expressly forbidden such, but have merely refrained from granting the power, the same situation exists, for powers not granted are forbidden by implication (First National Bank v. Exchange Bank, 92 U. S. 122; Central Co. v. Pullman Co., 139 U. S. 24).

That question we now lay aside; but if Congress have forbidden, or have not granted the power in question, *what change was made in the law with respect thereto by this state statute?* And may the state take over undoubted national functions by merely echoing national statutes?

The practical effect of the majority opinion accords no other force or effect than the foregoing to the statute. The state proceeds, *pro forma*, under its own statute, it is true; but, in essence, the only effect of its statute is to enable it to assume functions of the National Government in the enforcement of national laws. This is certainly the first instance where this Court has declared a state law respecting a national bank to be a valid enactment, *where the presence or absence of the statute made absolutely no change in the applicatory rules of law*, as this statute is held by the majority opinion to do.

“The very meaning of sovereignty is that the decree of the sovereign *makes law*” (American Banana Co. v. United Fruit Co., 213 U. S. 358). The decree

of the state in this case makes nothing and can make nothing. If the bank has, under the act of Congress, power to do the thing in question, the state cannot take it away; if it has it not, the state cannot confer it. What "law" or change in the "law" did this decree of the State Legislature make, or what could it make? And if none, then sovereignty over the subject matter is wanting.

F. The application of state laws as rules of decision concerning the transactions of national banks is by no means limited to state statutes; everyday observation shows the doctrine to embrace the unwritten or judicially declared law as well.

The fundamental basis for the application of the law of the locality to a national bank is the consent of Congress, express or implied. This must be true; for it is the settled doctrine of this Court that national banks "are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit" (Van Reed v. People's National Bank, 198 U. S. 554, 557; Farmers' Bank v. Dearing, 91 U. S. 29, 34).

The consent of the National Legislature to the exercise of the power of taxation by the states was expressly given. Under that grant of power the procedure adopted by the states to carry into execution the power of taxation thus expressly conferred was

held a matter for their own choice, *unless the method selected conflicted with some legislation by Congress or was so shaped as to impair the efficiency of the bank as a Federal agency*. Upon this formula the tax machinery prescribed by Kentucky in execution of the power was examined and approved in *National Bank v. Commonwealth*, 9 Wall. 353; and that of Vermont in *Waite v. Dowley*, 94 U. S. 527. These are two of the cases cited in the majority opinion; the point in judgment in each was as stated; and they are authority for nothing beyond, because, under familiar rules, they are to be read in the light of the facts in judgment.

With respect to the application of "*general, un-discriminating state laws*" to "*the contracts and dealings*" of national banks (*First National Bank v. California*, 262 U. S. 366, 369), the authorization of Congress for the application of the state law is *implied* from the creation of such banks to engage in business in a given state, without prescribing the rules of law to govern the conduct of their transactions. The same limitation has been announced to prevail here also, to wit, that even the general laws of the state may not be applied to the transactions of a national bank if they conflict with congressional regulations or impair the efficiency of the bank as an agency of government. Accordingly, in *Davis v. Elmira Savings Bank*, 161 U. S. 275, the insolvent

laws of a state of general terms and application were held inapplicable to insolvent national banks, because in conflict with congressional regulations; while in *McClellan v. Chipman*, 164 U. S. 347, such general insolvent laws of the state were held binding on a national bank *as a creditor* of the insolvent, because Congress had not legislated on the subject.

These are the two remaining cases cited in support of the majority opinion. It seems plain that they are not authority for state legislation respecting the corporate capacity and functions of a national bank for the reason that they do not deal with that question.

And where is found the consent of Congress that the states may, by statute, prescribe the corporate capacity or deal with the internal regulations of a national bank? With that subject Congress completely dealt by inclusion and excusion, and into that field it has not invited the states, either expressly or impliedly. Indeed, it has been pointedly held that Congress intended to exclude the states from that very function (*Easton v. Iowa*, 188 U. S. 220, 229).

G. There are various and sundry internal regulations prescribed by Congress with respect to national banks.

By way of illustration: A provision as to when they may and when they may not lend money on real estate (38 St. 273, Sec. 24); regulation of their ac-

ceptance and discount of bills of exchange (*Id.*, p. 263, Sec. 13); the establishment of foreign branches (*Id.*, p. 273, Sec. 25); removal to another town in the same state (24 St. c. 73, Sec. 2); ownership of real estate (R. S. 5137); amount of capitalization (31 St. 48 c. 41, Sec. 10); method of providing it (R. S. 5140) and of reducing and increasing it (R. S. 5142 and 5143); the rights of shareholders to vote (R. S. 5144); the qualifications of directors (R. S. 5146 and 38 St. 732, Sec. 8); the manner of qualifying as a director (R. S. 5147); limiting loans to one person or concern (R. S. 5200, amended 41 St. 296, Ch. 79); limiting its indebtedness (R. S. 202, amended 41 St. 296, Ch. 79).

Other regulations might be mentioned, just as internal, but not more so than R. S. 5190 involved here.

The method prescribed for the enforcement of these regulations (including R. S. 5190) is the same, viz., an action in the name of the United States (12 St. 680, Ch. 58, Sec. 55) or in the name of the Comptroller (R. S. 5239) to compel the bank to observe the limitations prescribed.

Now, suppose the state should place all these regulations (and the other similar ones to which we have not referred) upon its own statute books. It could not be said that there would then be any express conflict between the state statutes and the acts of Congress in the sense that differing provisions are prescribed. And yet it must be apparent that if such

statutes are to be held valid, *the entire supervision of the internal management of national banks has been accorded to the states in which they are located.*

Were it not beyond the proper limits of this presentation, the same situation might be demonstrated to exist with respect to the federal land banks and the joint stock land banks (Act July 17, 1916, Ch. 245, 39 St. 360) and other incorporated federal agencies.

H. And the fact is that never before has the rule respecting the validity of a state statute when not in conflict with an act of Congress been applied to a situation *where Congress have dealt with the question.* The prior instances have been where Congress had said nothing on the particular subject.

But Congress dealt with the powers of the bank (and, as R. S. 5190 is interpreted, with its powers in the respect here under inquiry).

The true rule to be applied is, as declared in *Easton v. Iowa*, 188 U. S. 220, and earlier cases there cited, that where Congress have dealt supremely with a subject state legislation is excluded, of whatsoever tenor.

I. This is certainly a visitatorial statute, if it is anything (*Guthrie v. Harkness*, 199 U. S. 157). Congress, having amply provided for visitation, in court and otherwise, of national banks, expressly forbade

visitation to the state legislatures (R. S. 5241, 38 St. Part. I, 272, Ch. 6, Sec. 21). Its constitutional power to so do cannot admit of question (Van Reed v. People's National Bank, 198 U. S. 554; Farmers' Bank v. Dearing, 91 U. S. 29).

We stress no other question than the foregoing at this time, for two reasons: In the first place, the distinction between branch banks of independent activities (as dealt with by Mr. Attorney-General Wick-ersham) and branch offices of national banks without discretionary powers (as dealt with by Mr. Attorney-General Daugherty) cannot be discussed within the proper limits of a paper of this import. Moreover, such distinction is of no consequence to the plaintiff in error if the validity of the state statute, forbidding as it does both forms of activity, is to be affirmed.

In the second place, if branch banking is of sound economic value it will somehow win through. But the regulation by one sovereignty of the operations of the other—or (which is the same thing) the creatures of the other—has to do with the very fundamentals of the dual government framed by our forefathers. The perpetuity of our institutions depends in no small measure upon the correct demarcation of the line which separates the functions of the two. It is our respectful, but earnest, insistence that the

majority opinion in this case has confused this boundary.

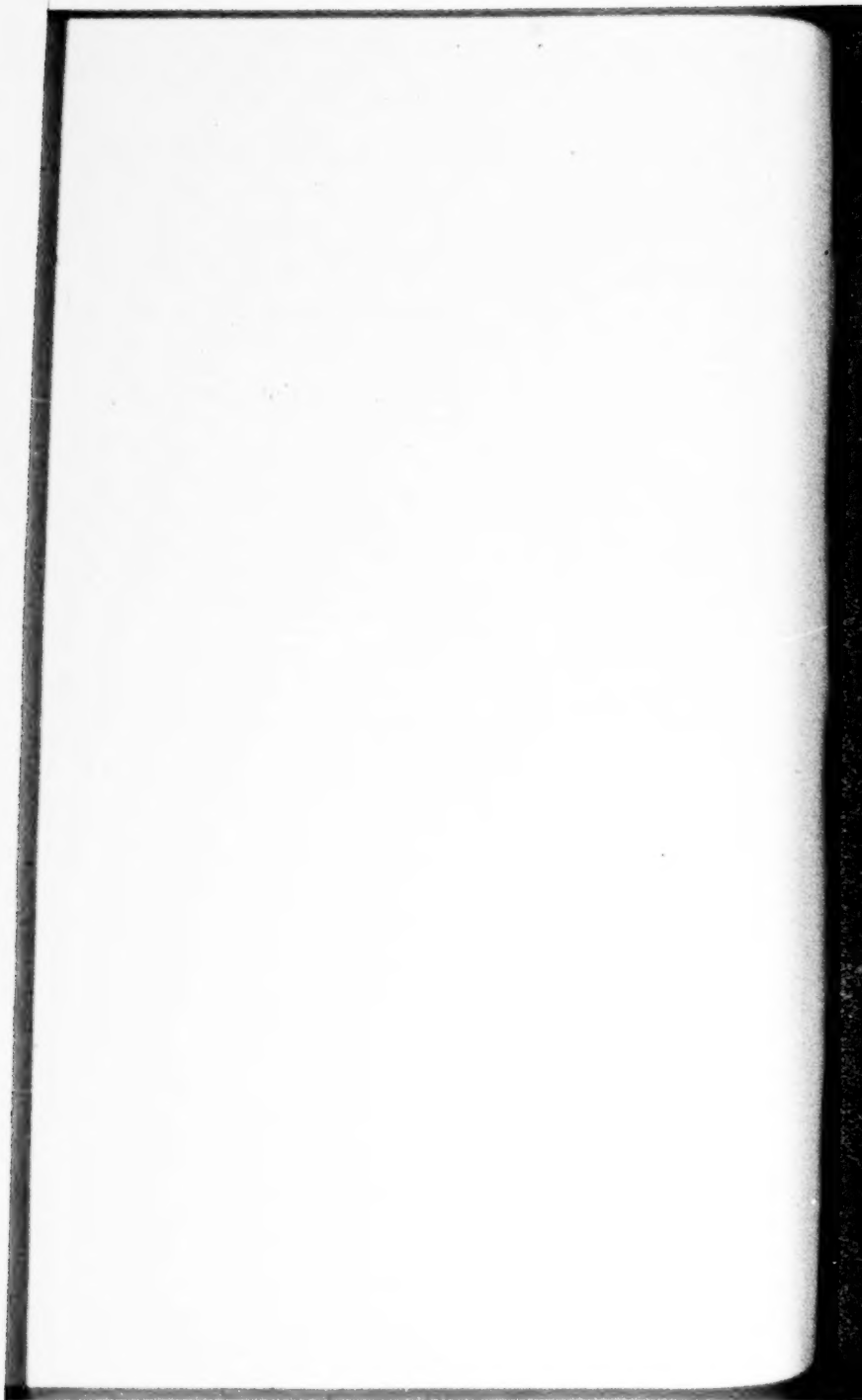
Respectfully submitted,

JAMES C. JONES,
FRANK H. SULLIVAN,

For Plaintiff in Error.

We hereby certify that we are counsel for plaintiff in error in this case, and that the foregoing petition for rehearing was prepared by us, and that it is, in our opinion, well founded.

JAMES C. JONES,
FRANK H. SULLIVAN.



In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS, plaintiff in error, v. STATE OF MISSOURI, ON INFORMATION of Jesse W. Barrett, Attorney General.	}	No. 252.
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IN ERROR TO THE SUPREME COURT OF THE STATE OF
MISSOURI.

SUGGESTION OF UNITED STATES ON PETITION FOR REHEARING.

The Solicitor General, as *amicus curiae*, desires to join in the motion for rehearing filed herein on the following grounds:

This case having been twice argued, the United States should not ask for a rehearing, notwithstanding its importance, if every pertinent fact has been considered by the Court. In the many cases which I have had the honor to argue as Solicitor General in this Court, I have rarely asked for a rehearing, when the decision was adverse to the Government's contention. In this case I am impressed with the fact that in neither the majority nor the minority opinion is there any discussion of the Revised Statutes (Section 5239), on which I chiefly relied in my oral

argument as establishing a congressional direction that any question as to whether a national bank had exceeded its powers should only be determined in a suit instituted by the Comptroller of the Currency in the courts of the United States. (The section is quoted as an appendix.) The Government contended, and still contends, that this was an affirmative exclusion by Congress, in a matter over which the Federal Government had plenary power of legislation, of any right on the part of a State to determine by *quo warranto* the scope and powers of a national bank in the courts of the State.

The failure of the Court to discuss this statute suggests the possibility that with the great pressure of business the Court in considering this case overlooked it. If so, the Government earnestly hopes that a rehearing may be granted, so that the application of this statute to the question at issue may be argued and considered by the Court.

If, however, the Court did consider the application of this statute, and reached the conclusion that it was inapplicable, the Government does not feel justified in asking for a reargument, especially as it is not a party to the litigation and as the case has already been twice argued. While not a party to this case, the Government has a deep and practical interest in the question.

The application of the section is very earnestly pressed upon the Court. The Government expresses the hope that even if the Court does not consider this statute as affecting the decision already rendered, it

will at least in a supplemental opinion explain why it is not applicable in excluding the judicial power of the courts of Missouri to determine by the high prerogative writ of *quo warranto* the powers of a Federal instrumentality.

This suggestion is earnestly pressed for the reason that if the section is not applicable the reasons for this conclusion should be brought to the attention of Congress, so that the law-making body, if it is unwilling to submit these fiscal instrumentalities of the Government to the dual visitorial power of the courts of the State and of the Union, may by supplemental legislation make their purpose more clear.

JAMES M. BECK,

Solicitor General.

FEBRUARY, 1924.

APPENDIX.

Section 5239 of the Revised Statutes provides:

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, *in a suit brought for that purpose by the Comptroller of the Currency*, in his own name, before the associa-

tion shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation. (*Italics ours.*)



SUPREME COURT OF THE UNITED STATES.

No. 252.—OCTOBER TERM, 1923.

First National Bank in St. Louis Plain-
tiff in Error,
vs.
State of Missouri, at the information
of Jesse W. Barrett, Attorney
General.

23
In Error to the Supreme
Court of the State of
Missouri.

[January 28, 1924.]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

~~The State of Missouri brought this proceeding in the nature of~~
~~quo warranto in the State Supreme Court~~ against the plaintiff in
error to determine its authority to establish and conduct a branch
bank in the City of St. Louis. The information avers that the
bank was organized under the laws of the United States and was
and is engaged in a general banking business in that city at a bank-
ing house, the location of which is given; that, in contravention of
its charter and of the act of Congress under which it was in-
corporated, it has illegally opened and is operating a branch bank
for doing a general banking business in a separate building several
blocks from its banking house, and proposes to open additional
branch banks at various other locations, and that this is in violation
of a statute of the State expressly prohibiting the establishment
of branch banks. The prayer is that, upon final hearing, the bank
be ousted from the privilege of operating this branch bank or any
other. A demurrer to the information was interposed and the
cause thereupon submitted. The contention of the State was upheld
and judgment rendered in accordance with the prayer. — Mo. —

The correctness of the judgment is challenged under numerous
specifications of error presenting federal questions, which, for
the purposes of the case, may be considered under two heads:
(1) Whether the state statute is valid as applied to national banks;
and (2) Whether a proceeding to call a national bank to account

for acts of the kind here alleged may be maintained by the State, and whether the form of remedy pursued is sustainable.

First. The Missouri statute (§ 11737, R. S. Mo., 1919) provides "that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house." That the facts alleged in the information bring the case within that part of the statute which prohibits the maintenance of branch banks and that the statute applies to national banks is conclusively established by the decision of the State court, and we confine ourselves to the inquiry whether, as thus applied, the statute is valid.

National banks are brought into existence under federal legislation, are instrumentalities of the federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States. *National Bank v. Commonwealth*, 9 Wall. 353, 362; *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283. These two cases are cited and followed in the later case of *McClellan v. Chipman*, 164 U. S. 347, 357, and the principle which they establish is said to contain a rule and an exception, "the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." See also *Waite v. Dowley*, 94 U. S. 527, 533. The question is whether the Missouri statute falls within the rule or within the exception.

Does it conflict with the laws of the United States? In our opinion, it does not. The extent of the powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established. *Bullard v. Bank*, 18 Wall. 589, 593; *Logan County Bank v. Townsend*, 139 U. S. 67, 73; *California Bank v. Kennedy*, 167 U. S. 362, 366. Among other things the federal law (R. S., § 5154) provides that the organization certificate of the association shall specifically state

"the place where its operations of discount and deposit are to be carried on, designating the state, territory or district and the particular county, city, town or village." By another provision (R. S., § 5190) it is required that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate." Strictly, the latter provision, employing, as it does, the article "an", to qualify words in the singular number, would confine the association to one office or banking house. We are asked, however, to construe it otherwise in view of the rule that "words importing the singular number may extend and be applied to several persons or things." R. S., § 1. But obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute. See *Garrigus v. Board of Commissioners*, 39 Ind. 66, 70; *Moynehan v. City of New York*, 205 N. Y. 181, 186. Here there is not only nothing in the context or in the subject matter to require the construction contended for, but other provisions of the national banking laws are persuasively to the contrary. By Section 5138, R. S., the minimum amount of capital is fixed in proportion to the population of the place where the bank is located. If it had been intended to allow the establishment by an association of not one bank only but, in addition, as many branch banks as it saw fit, it is remarkable, to say the least, that there should have been no provision for adjusting the capital to the latter contingency or for determining how or under what circumstances such branch banks might be established or for regulating them. Section 5155, R. S., provides that it shall be lawful for a state bank "having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association . . . and to retain and keep in operation its branches . . . the amount of circulation . . . to be regulated by the amount of capital assigned to and used by each." This provision, confined by its terms, as it is, to existing State institutions, may be fairly considered as constituting an exception to the general rule, and the presence of safeguarding limitations in the excepted case, with their entire absence from the statute otherwise, goes far in the direction of confirming the conclusion that the general rule does not contemplate the establishment of branch banks. This apparently was the interpretation of Congress itself, since in two instances at least

special legislation was deemed necessary to allow the establishment of branch banks, viz: at the Chicago Exposition, in 1892, c. 71, 27 Stat. 33, and at the St. Louis Exposition, in 1901, c. 864, 31 Stat. 1444, § 21, the existence of the branch bank in each instance being expressly limited to the period of two years.

The construction of the executive officers charged with the administration of the law has been, with substantial uniformity, to the same effect, and in this view the Department of Justice, in a well considered opinion, rendered May 11, 1911, concurred. *Lowry National Bank—Establishment of Branches.* 29 Op. Atty Genl. 81.*

This interpretation of the statute by the legislative department and by the executive officers of the government would go far to remove doubt as to its meaning if any existed. See *Tiger v. Western Investment Co.*, 221 U. S. 286, 309; *United States v. Hermanos y Compañia*, 209 U. S. 337, 339.

But it is said that the establishment of a branch bank is the exercise of an incidental power conferred by Section 5136 R. S. by which national banking associations are vested with "all such incidental power as shall be necessary to carry on the business of banking." The mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of this provision. Moreover, the reasons adduced against the existence of the power substantively are conclusive against its existence incidentally; for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.

Clearly, the state statute, by prohibiting branches, does not frustrate the purpose for which the bank was created or interfere with the discharge of its duties to the government or impair its efficiency as a federal agency. This conclusion would seem to be

*Our attention is directed to a later opinion of the Attorney General, dated October 3, 1923, which, although in terms affirming the earlier opinion, announces a limited rule which does not seem to be in precise agreement with it. To the extent of the disagreement, however, we accept the view of the earlier opinion.

self evident, but if warrant for it be needed, it sufficiently lies in the fact that national banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them. If the non-existence of such branches or the absence of power to create them has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken by Congress to remedy the omission.

Second. The state statute as applied to national banks is, therefore, valid, and the corollary that it is obligatory and enforceable necessarily results, unless some controlling reason forbids; and, since the sanction behind it is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law. It is insisted with great earnestness that the United States alone may inquire by *quo warranto* whether a national bank is acting in excess of its charter powers, and that the State is wholly without authority to do so. This contention will be conceded since it is plainly correct, but the attempt to apply it here proceeds upon a complete misconception of what the State is seeking to do, a misconception which arises from confounding the relief sought with the circumstances relied upon to justify it. The State is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the State is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation. The latter inquiry is preliminary and collateral, made only for the purpose of determining whether the state law is free to act in the premises or whether its operation is precluded in the particular case by paramount law. Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforce-

ment of the state statute. In other words, the national statutes are interrogated for the sole purpose of ascertaining whether anything they contain constitutes an impediment to the enforcement of the state statute, and the answer being in the negative, they may be laid aside as of no further concern.

The application of the state statute to the present case and the power of the State to enforce it being established, the nature of the remedy to be employed is a question for state determination; and the judgment of the State court that the one here employed was appropriate is conclusive unless it involves a denial of due process of law, which plainly it does not. We are not concerned with the question whether an information in the nature of *quo warranto*, according to the general principles of the law, is in fact appropriate. It is enough that the Supreme Court of the State has so held. *Standard Oil Co. v. Missouri*, 224 U. S. 270, 287; *Twining v. New Jersey*, 211 U. S. 78, 110-111. In *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 393, this court said: "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. . . . Whether the court of last resort of the State of Iowa properly construed its own constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court." See also *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236; *Hooker v. Los Angeles*, 188 U. S. 314, 318; *Rogers v. Peck*, 199 U. S. 425, 435.

The judgment of the Supreme Court of Missouri is therefore

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 252.—OCTOBER TERM, 1923.

First National Bank in St. Louis,	}	In Error to the Supreme Court of the State of Missouri.
Plaintiff in Error,		
vs.		
State of Missouri, at the information of Jesse W. Barrett, Attorney Gen- eral.		

[January 28, 1924.]

Mr. Justice VAN DEVANTER, dissenting.

I am constrained to dissent from the opinion and judgment just announced.

National Banks are corporate instrumentalities of the United States created under its laws for public purposes essentially national in character and scope. Their powers are derived from the United States, are to be exercised under its supervision and can be neither enlarged nor restricted by state laws. The decisions uniformly have been to this effect and have proceeded on principles which were settled a century ago in the days of the Bank of the United States.

In *McCulloch v. Maryland*, 4 Wheat. 316, where the status of that bank was drawn in question and elaborately discussed, this Court reached the conclusion that the Constitution invests the United States with authority to provide, independently of state laws, for the creation of banking institutions, and their maintenance at suitable points within the States, as a means of carrying into execution its fiscal and other powers. Chief Justice Marshall there dealt with the respective relations of the United States and the States to such an instrumentality in a very plain and convincing way. Among the other things, he said:

(p. 424) "After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land."

2 *First National Bank in St. Louis vs. State of Missouri.*

(p. 427) "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its operations from their influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain."

(p. 429) "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme."

In *Osborn v. Bank of the United States*, 9 Wheat. 738, there was drawn in question the validity of a state statute which, after reciting that the bank had been pursuing its operations contrary to a law of the State, provided that if the operations were continued the bank should be liable to specified exactions, called a tax. The statute was held invalid, the court saying:

(pp. 860, 861) "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. . . . It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government."

The later legislation of Congress under which national banks are created and maintained stands on the same constitutional plane. When its validity has been assailed, or its operative force in a state questioned, the cases just mentioned have been regarded as settling the principles to be applied.

In *Farmers' and Mechanics' National Bank v. Dearing*, 91 U. S. 29, 31, the court referred to those cases, pronounced their reasoning applicable to the later legislation, and said:

(pp. 33-34) "The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They

are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give'."

To the same effect are *Easton v. Iowa*, 188 U. S. 220, 230, 237; *Van Reed v. People's National Bank*, 198 U. S. 554, 557; *First National Bank v. Union Trust Co.*, 244 U. S. 416, 425; and *First National Bank v. California*, 262 U. S. 366, 369. Of special pertinence are the following excerpts from *Easton v. Iowa*:

(p. 229) "That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States."

(pp. 231-232) "It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute.

"It is argued by the learned Attorney General on behalf of the State of Iowa that 'the effect of the statute of Iowa is to require of the officers of all banks within the State a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of national banks, and in the honesty and integrity of their managing officers. It enables them better to accomplish the purposes and designs of the general government, and is an aid, rather than impediment, to their utility and efficiency as agents and instrumentalities of the United States.'"

"But we are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities."

It must be admitted that, in so far as the legislation of Congress does not provide otherwise, the general laws of a State have the same application to the ordinary transactions of a national bank,—such as incurring and discharging obligations to depositors, presenting drafts for acceptance or payment and giving notice of their dishonor, taking pledges for the repayment of money loaned, and receiving or making conveyances of real property,—that they have to like transactions of others. But not so of questions of corporate

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power. As explained in *Easton v. Iowa* and other cases, their solution must turn on the laws of the United States under which the bank is created.

National banks, like other corporations, have such powers as their creator confers on them, expressly or by fair implication, and none other. *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71, 82; *Logan County National Bank v. Townsend*, 139 U. S. 67, 73. Powers not so conferred are in effect denied; a prohibition is implied from the failure to grant them. *First National Bank v. National Exchange Bank*, 92 U. S. 122, 128; *California National Bank v. Kennedy*, 167 U. S. 362, 367. In short, all the powers of a national bank, like its right to exist at all, have their source in the laws of the United States. Only where those laws bring state laws into the problem,—as by enabling national banks to act as executors, administrators, etc., where that is permitted by state laws,—can the latter have any bearing on the question of corporate power—the privileges which the bank may exercise. *First National Bank v. Union Trust Co.*, 244 U. S. 416.

The proceeding now before us is an information in the nature of *quo warranto* brought in the Supreme Court of Missouri, whereby that State challenges the power of a national bank in the city of St. Louis to conduct a branch bank established by it in that city and asks that the bank be ousted from that privilege on the grounds, first, that establishing and conducting the branch is a violation of the bank's charter powers, and, secondly, that it is prohibited by a law of the State.

It is not claimed that the laws of the United States contain any provision whereby the privilege asserted by the bank is made to depend on the will or legislative policy of the State; nor do they in fact contain any such provision. Whether the bank has the privilege which it asserts is therefore in no way dependent on or affected by the state law, but turns exclusively on the laws of the United States. If they grant the privilege, expressly or by fair implication, no law of the State can abridge it or take it away. And if they do not grant it, they in effect prohibit it, and no law of the State can strengthen or weaken the prohibition. In either event nothing can turn on the state law. It simply has no bearing on the solution of the question.

In this situation the State is not, in my opinion, entitled to maintain the proceeding. It has no distinctive right to protect,

nor any applicable law to vindicate or enforce. The proceeding is one which may be maintained only in the public right. Here the State is not authorized to represent or to speak for the public. The bank is not a creation and instrumentality of the State, but of the national government. Its presence in the State is attributable to the national power, not to the State's permission. Whether the bank shall be kept within its legitimate powers and made to discontinue any departure from or abuse of them is a matter in which the people of all the States have the same interest, the bank being a national creation and instrumentality. The people of Missouri merely share in the common interest. "In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." *Massachusetts v. Mellon*, 262 U. S. 447, 486. It therefore is apparent that the State is here mistakenly appropriating to itself a function which belongs to the United States.

In *Tarble's Case*, 13 Wall. 397, 407, which possessed features making it particularly pertinent here, this Court pointed out the distinct and independent character of the national and state governments, within their respective spheres, and in that connection said:

"Neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all, shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

Another case apposite in principle is *Territory v. Lockwood*, 3 Wall. 236. It was a proceeding in the nature of *quo warranto* brought by the Territory of Nebraska to test the defendant's right to hold a Federal office in the Territory which he was charged with unlawfully usurping. This Court disposed of the matter by saying, p. 239:

"The right of the Territory to prosecute such an information as this would carry with it the power of amotion without the con-

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currence of the government from which the appointment was derived. This the Territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of States as to the Federal officers whose duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the Government of the nation."

With great deference, I think the judgment below should be reversed on the ground that the State is without capacity to bring or maintain this proceeding, and the court below without authority to entertain it.

The CHIEF Justice and Mr. Justice BUTLER authorize me to say that they concur in this dissent.

